UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROL A. RUTHERFORD,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,

Defendant.

Case No. 97-CV-528-J

ORDER

On July 20, 1998, this Court affirmed the Commissioner's decision. The same was appealed to the Tenth Circuit Court of Appeals. On August 26, 1999, the Tenth Circuit reversed the decision of the district court and remanded the case to the district court. On October 28, 1999, this court remanded the case to the Commissioner for further proceedings.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $6,577.25 for attorney fees and $385.20 for costs, for a total award of $6,962.45, for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $6,577.25 and costs of $385.20 under EAJA. If

attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 9 day of December 1999.

SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

2600-030

ENTERED ON DOCKET

DATE DEC 10 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLEO KING AND CHARLENE KING,

Plaintiffs,

vs.

LANE M. LANGLEY, an Individual, INTERVEST INTERNATIONAL EQUITIES CORPORATION, a Florida Corporation, JOHN LANG & ASSOCIATES, INC., f/k/a COVENANT MARKETING CONCEPTS, INC., an Alabama Corporation, and PRIME ATLANTIC, INC., a Florida Corporation,

Defendants.

FILED

DEC 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0085H(J)

ORDER OF
DISMISSAL WITH PREJUDICE

Upon the Application for Order of Dismissal with Prejudice filed by the Plaintiffs herein, pursuant to Fed.R.Civ.P. 41(a)(2), the Court finds that the Defendants, Lane M. Langley, Intervest International Equities Corporation, and John Lang & Associates, Inc. f/k/a Covenant Marketing Concepts, Inc., should be and are hereby dismissed with prejudice from the above entitled action and each party shall pay their own respective attorney fees and costs herein.

IT IS SO ORDERED.

Dated this 9TH day of ~~November~~ December, 1999.

The Honorable Sven Erik Holmes
United States District Judge
Northern District of Oklahoma

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STIPULATED AND APPROVED:

BARROW GADDIS GRIFFITH & GRIMM

By _____
William R. Grimm 3628
610 South Main, Suite 300
Tulsa, OK 74119
Ph: (918) 584-1600
Fax: (918) 585-2444

ATTORNEYS FOR CLEO KING and
MARY CHARLENE KING

FRED C. CORNISH, INC.

By _____
Harlan S. Pinkerton, Jr. 7164
Fred C. Cornish 1924
406 S. Boulder Avenue
610 Beacon Building
Tulsa, OK 74103-3825
Ph: (918) 583-2284
Fax: (918) 585-9619

ATTORNEYS FOR LANE M. LANGLEY

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

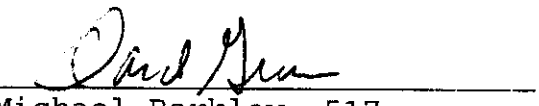
By _____
Richard H. Foster 3055
320 S. Boston Ave., Suite 500
Tulsa, OK 74103
Ph: (918) 582-1211
Fax: (918) 519-5360

and

Douglas L. McCoy, Esq.
HAND ARENDALL, L.L.C.
P. O. Box 123
Mobile, AL 36601
Ph: (334) 432-5511
Fax: (334) 694-6375

ATTORNEYS FOR JOHN LANG &
ASSOCIATES, INC.

BARKLEY TITUS HILLIS & REYNOLDS

By 

Michael Barkley 517
David G. Graves 14723
Brad Smith 8382
2700 Mid-Continent Tower
401 South Boston
Tulsa, OK 74103-4035

ATTORNEYS FOR INTERVEST INTER-
NATIONAL EQUITIES CORPORATION

S:\WPDOC\WRG499\2600-030.OD
abh 11/17/99

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAYLOR SCOTT WOOD,

Plaintiff,

v.

VETERANS ADMINISTRATION, *et al.*,

Defendants.

Case No. 98-CV-802-H

ORDER

This matter comes before the Court pursuant to the Motion to Dismiss All Claims Against All Federal Defendants (Docket #6) and the Report and Recommendation of the United Magistrate Judge (Docket # 26).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge and on a de novo review of the record in this case, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. Accordingly, the Motion to Dismiss All Claims Against All Federal Defendants (Docket #6) is hereby granted.

IT IS SO ORDERED.

This 9TH day of December, 1999.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD MARCANTEL and DEBRA, MARCANTEL,

Plaintiffs,

v.

AUTOZONE, INC., CHAMPION, LABORATORIES, and FUEL FILTER TECHNOLOGIES, INC.,

Defendants.

98-CV-527-H(E)

ORDER

This matter comes before the Court on Defendants Autozone, Champion Laboratories, and Fuel Filter Technologies' Motion for Summary Judgment on the Issue of Deborah Marcantel's Cause of Action for Loss of Consortium (Docket # 47) and on Defendant Fuel Filter Technologies' Motion of Summary Judgment (Docket # 47). The Court held a hearing on these motions and other pre-trial matters on December 3, 1999. Pursuant to the rulings made by the Court at that hearing, the Court hereby grants Defendants' motions.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer

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evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

Defendants seek summary judgment on Plaintiff Deborah Marcantel's claim for damages.

According to Defendants, Deborah Marcantel may not recover damages related to the injuries suffered by Richard Marcantel because the two were not married at the time of the events giving rise to this lawsuit. In Oklahoma, a party seeking loss of consortium damages must be married to the injured party. See Lee v. Cotten, 793 P.2d 1369, 1370-71 (Okla. Ct. App. 1990). Plaintiff concedes that the Marcantels were not married at the time of the accident. Therefore, the Court finds that Mrs. Marcantel's claim for loss of consortium fails as a matter of law. Accordingly, Defendant's motion for summary judgment (Docket # 46) is granted.

Defendant Fuel Filter Technologies also moved for summary judgment based on its claim that it did not manufacture the fuel filter at issue in this case. Plaintiff confessed this motion, and the Court therefore grants it.

In sum, the Court grants Defendants' Motion for Summary Judgment (Docket # 46) and Fuel Filter Technologies' Motion for Summary Judgment (Docket # 47).

IT IS SO ORDERED.

This 7TH day of December, 1999.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BETTY J. McMAHON,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 97-CV-598-J

ORDER

On July 31, 1998, this Court affirmed the decision of the Commissioner. The case was appealed to the Tenth Circuit Court of Appeals and was then remanded to the Commissioner on October 16, 1999 for further proceedings.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $6,018.50 for attorney fees and $127.83 for costs, for a total award of $6,146.33, for all work done before the district court and the court of appeals, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $6018.50 and costs of $127.83 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 7 day of December 1999.

SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 8 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 99CV0700E(M)
)
WESLEY MOWMAN, JR.,)
)
Defendant.)

ENTERED ON DOCKET
DATE DEC 09 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 7th day of December, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Wesley Mowman, Jr., appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Wesley Mowman, Jr., was served with Summons and Complaint on November 1, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Wesley Mowman, Jr., for the principal amounts of $1,113.86 and $2,810.83,

plus accrued interest of $783.63 and $2,073.49, plus interest thereafter at the rates of 12% and 8% per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.471 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MOHAMMED AMEEN,

Plaintiff,

vs.

BRIDGESTONE/FIRESTONE, INC.,

Defendants.

Case No. 99-CV-741-BU(J)

ORDER

This matter comes before the Court upon the Motion to Dismiss, or in the Alternative, to Stay Proceedings and Compel Mediation and Arbitration filed by Defendant, Bridgestone/Firestone, Inc. In its motion, Defendant seeks an order dismissing Plaintiff's complaint or staying this action and compelling mediation and arbitration of the claims alleged in Plaintiff's complaint pursuant to Defendant's mandatory alternative dispute resolution program. Plaintiff, Mohammed Ameen, has responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

BACKGROUND

Plaintiff began working for Defendant in May of 1983 and held various positions at Defendant's retail stores in Tulsa, Oklahoma until 1992, when he voluntarily resigned. In May of 1995 Defendant rehired Plaintiff to manage a Tulsa retail location. Plaintiff remained employed by Defendant until May of 1997. The parties dispute the circumstances surrounding Plaintiff's second separation from Defendant's employ: Plaintiff alleges that he experienced

unlawful discrimination and was constructively discharged, while Defendant claims that Plaintiff voluntarily resigned his position. Plaintiff alleges that thereafter he filed a complaint with the Oklahoma Human Rights Commission and received his "90 day right to sue" letter on May 5, 1999. Plaintiff then initiated this action.[1]

Plaintiff alleges in the Complaint that he was harassed, discriminated and retaliated against, and constructively discharged from his job on account of his race, national origin and an alleged disability in violation of: Title VII of the Civil Rights Act of 1964 (Claims I and II); the Americans with Disabilities Act of 1990 (the "ADA") and the Rehabilitation Act of 1993 (Claim III); Oklahoma public policy (Claim IV); and 42 U.S.C. § 1981, et seq. (Claim V). Plaintiff seeks equitable and legal relief, including punitive damages, and demands a jury trial. Thereafter Defendant filed this motion to dismiss or stay and compel mediation and arbitration.

Defendant asserts that on or about October 1, 1995, it instituted a mandatory Employee Dispute Resolution Plan ("EDR Plan" or "Plan") for all of its non-union employees nationwide. According to Defendant, it provided copies of the EDR plan prior to its implementation to all covered employees, including Plaintiff, who was then employed as a manager at one of Defendant's Tulsa locations. Defendant attaches to its motion an undated sheet signed by Plaintiff and other employees at his retail location

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[1] Plaintiff initially filed his Complaint in Tulsa County district court, and Defendant removed the action to this Court.

purportedly evidencing their receipt of an envelope containing the EDR Plan; this document then was returned to Defendant's district office. (Def.'s Brief Supp. Mot. Dis., Ex. A, Attach. 2).[2] In addition, Defendant alleges that as a store manager Plaintiff would have been responsible for distributing to new employees a package which contained the EDR Plan. Further, Defendant contends that retail store employees also receive a copy of Defendant's Employment Information for Associates Handbook ("Handbook"), which

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[2] This document reads:

STORE # 7838 TULSA 41ST

TO THE STORE MANAGER: ENCLOSED YOU WILL FIND AN ENVELOPE FOR EACH ASSOCIATE IN YOUR STORE, INCLUDING YOURSELF. THE ENVELOPE CONTAINS IMPORTANT INFORMATION REGARDING THE NEW BRIDGESTONE/FIRESTONE EMPLOYEE DISPUTE RESOLUTION PLAN.

1. PLEASE DISTRIBUTE THE ENVELOPES AND HAVE EACH ASSOCIATE WHO HAS RECEIVED AN ENVELOPE SIGN NEXT TO HIS OR HER NAME ON THIS SHEET. PLACE YOUR INITIALS NEXT TO EACH ASSOCIATES NAME AS WELL.

2. IDENTIFY ON THIS SHEET ANY ASSOCIATE WHO IS NO LONGER EMPLOYED AT YOUR STORE.

3. IF THERE IS AN ASSOCIATE AT YOUR STORE WHO IS NOT LISTED HERE, WRITE THAT ASSOCIATES NAME ON THIS SHEET, GIVE THAT ASSOCIATE ANY ENVELOPE YOU HAVE LEFT AND HAVE THE ASSOCIATE SIGN THIS SHEET ACKNOWLEDGING RECEIPT. CONTACT YOUR DISTRICT OFFICE FOR ADDITIONAL ENVELOPES YOU MAY NEED.

4. ONCE YOU HAVE COMPLETED THIS SHEET AND THE DISTRIBUTION OF THE ENVELOPES, PLEASE RETURN THIS SHEET TO YOUR DISTRICT MANAGER.

THANK YOU FOR YOUR PROMPT COOPERATION IN THIS MATTER. IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT SCOTT [] IN THE LAW DEPARTMENT AT [].

This is followed by the typewritten names of Plaintiff and nine other employees, together with their signatures.

includes a discussion of the EDR Plan and the statement that:

> "[b]y accepting or continuing your employment with Bridgestone/Firestone, you agree to be bound to the terms of the Employee Dispute Resolution Plan and, accordingly, that any legal claims that you may have you will submit to the Plan's mediation and arbitration procedures rather than to the courts or governmental agencies."

(Def.'s Brief Supp. Mot. Dis., Ex. A., Attach. 3).

The cover page of the Plan itself contains a similar provision in prominent type:

> THE EMPLOYEE DISPUTE RESOLUTION PLAN BECOMES EFFECTIVE ON OCTOBER 1, 1995, AS THE EXCLUSIVE MEANS OF RESOLVING EMPLOYMENT-RELATED LEGAL CLAIMS. THAT MEANS IF YOU APPLY FOR EMPLOYMENT, ACCEPT EMPLOYMENT, OR CONTINUE WORKING AT BRIDGESTONE/FIRESTONE ON OR AFTER THAT DATE, YOU AGREE TO RESOLVE ALL SUCH CLAIMS THROUGH THIS PROCESS, INSTEAD OF THROUGH THE COURT SYSTEM OR ADMINISTRATIVE AGENCIES.

(Def.'s Brief Supp. Mot. Dis. at Ex. A, Attach. 1).

Defendant states that, despite the requirements of the EDR Plan, Plaintiff filed the instant action. Defendant asserts that the causes of action alleged in Plaintiff's Complaint are employment-related claims clearly covered by the EDR Plan, pursuant to ¶ 4B, which provides in pertinent part:

> [t]his Plan applies to any legal or equitable claim, demand or controversy, in tort, in contract, under common law or statute, or otherwise alleging violation of any legal obligation, between persons bound by the Plan, which relates to, arises from, concerns or involves in any way:
>
> ***
>
> The employment of an Employee, including the application for and the initiation, terms, conditions, or termination of such employment;
>
> ***
>
> or [a]ny other matter related to the relationship between the Employee and the Company including, by way of example and without limitation, allegations of: discrimination based on race, sex, religion, age, ethnic origin, national origin, disability or handicap; sexual or other harassment;...infliction of emotional distress...[and] wrongful discharge or wrongful termination.

Defendant also alleges that according to ¶ 3 of the Plan, "[p]roceeding under the Plan shall be the exclusive, final and binding method by which disputes are resolved...Except as otherwise provided herein, the Parties shall have no right to litigate a dispute in any other forum." Thus, because all of Plaintiff's claims are subject to mediation/arbitration, Defendant argues that Plaintiff has no right to bring the instant action.

In response, Plaintiff contends that his claims are not subject to arbitration because the EDR Plan is not an enforceable contract under Oklahoma common law for the following reasons: (1) Plaintiff failed to expressly consent or accept to be bound by the Plan; (2) the contract lacks consideration; and (3) the Plan is unconscionable in its terms because it violates Plaintiff's due process rights to fair time limitations, an impartial hearing, jury trial, and reasonable discovery of evidence in company files, and requires payment of fees.

Specifically, as to his allegation that the Plan is unenforceable because he did not consent to it, Plaintiff admits in his affidavit that his signature appears on the document acknowledging his acceptance of an envelope purportedly containing the Plan. However, Plaintiff alleges that he does not remember receiving or reading the Plan, and that he never agreed to its terms. Plaintiff contends that he did not expressly or implicitly consent to the terms of the EDR Plan; thus, no binding contract was created under Oklahoma law.

Plaintiff also asserts that the agreement fails for lack of

consideration. Plaintiff contends that his continued employment after receiving the EDR Plan could not satisfy the consideration requirement because he already had an employment relationship with Defendant. Further, Plaintiff contends that the "implied assent" provision of the Plan is unconscionable because it puts employees in the position of losing their jobs if they do not agree to the terms of the Plan, and additionally it denies Plaintiff the right to a jury trial and to effective discovery. Plaintiff also claims to be disadvantaged because Defendant is required to pay the mediator/arbitrator's fees, which will bias the mediator toward Defendant. Finally, Plaintiff claims that granting Defendant's motion will deny him any forum for his claims, because the mediator will dismiss his claims as untimely for not being brought within 90 days as required by the Plan.

In its reply brief, Defendant contends that the Federal Arbitration Act ("FAA"), which governs proceedings under the EDR Plan, requires only a written arbitration provision; it does not require that a party's signature appear on the agreement. Defendant asserts that Plaintiff's continued employment constituted his consent to arbitrate future disputes, and that the agreement is valid under Oklahoma law. Finally, in response to Plaintiff's claim that any referral to arbitration will be dismissed as untimely, Defendant states that it is "willing to stipulate that it will not attempt to preclude the arbitration of any claims that could be litigated if this case remained pending in federal court." (Reply Brief Supp. Def. Mot. Dis., at 9).

ANALYSIS

General Guidelines

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., was enacted "to reverse the longstanding judicial hostility to arbitration agreements," and "to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Subsequently, the Supreme Court has recognized a "liberal federal policy favoring arbitration agreements." Id. at 25 (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

Before addressing the appropriateness of granting a stay of litigation pending arbitration, the Court first must determine whether an agreement to arbitrate exists and whether such agreement covers the dispute in question. Avedon Engineering Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).

Existence of an Enforceable Arbitration Agreement

The existence of an agreement to arbitrate "is simply a matter of contract between the parties; [arbitration] is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration." Avedon, 126 F.3d at 1283 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-45 (1995)).

Under the FAA, ordinary contract principles govern whether parties have agreed to arbitrate. Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987); Avedon Engineering, 126 F.3d at 1287. In this case, such contract principles are derived from Oklahoma law. See

First Options of Chicago, Inc., 514 U.S. at 943-45.

Under Oklahoma law, the existence of a contract requires (1) competent parties, (2) their consent, (3) a lawful object, and (4) sufficient consideration. Okla. Stat. Ann. tit. 15, § 2 (West 1996). The parties' consent must be (1) voluntary, (2) mutual, and (3) communicated. Okla. Stat. Ann. tit. 15, § 51.

Plaintiff challenges the EDR Plan's validity on the ground that he did not sign the EDR Plan nor did he expressly consent to its terms. However, the FAA requires only that the arbitration provision be in writing; it does not require that a party sign the writing containing the arbitration clause. 9 U.S.C. §2;[3] Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973). The writing requirement is "intended to permit enforcement of arbitration agreements only in the face of competent evidence of the agreement's existence and scope." Durkin v. CIGNA Property & Cas. Corp., 942 F.Supp. 481, 487 (D. Kan. 1996). Consequently, a written policy, such as the EDR Plan here, is sufficient to satisfy the writing requirement of § 2 of the FAA. There is no requirement that Plaintiff physically endorse the Plan for it to be valid.

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[3] Section 2 of Title 9 of the United States Code provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable and enforceable . . . .

Further, a party need not explicitly consent to an agreement to be bound by it. "The parties' intentions are generously construed as to issues of arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985), and an arbitration agreement may be implied by the conduct of the parties. Teamsters Local Union No. 764 v. J.J. Merrit and Company, 770 F.2d 40, 42 (3rd Cir. 1985). Oklahoma law recognizes that implied contracts can arise from the inclusion of specific policy in an employee handbook. Gilmore v. Enogex, Inc., 878 P.2d 360, 368-369 (Okla. 1994) (recognizing that an implied contract may arise from policy statements contained in an employee handbook, but denying alleged handbook-based right of at-will employee to refuse a mandatory drug test); Langdon v. Saga Corp., 569 P.2d 524, 527 (Okla. Ct. App. 1976) (approving handbook-based right of employee to accrued but unused paid vacation time and certain severance allowances); Black v. Baker Oil Tools, 107 F.3d 1457, 1463 n.4 (10th Cir. 1997) (summarizing the Oklahoma Court's rationale in Gilmore: "[i]f the employee assents to the new terms and conditions of employment (by continuing to work or otherwise), then the new handbook governs the employment relationship prospectively, while the superseded handbook continues to govern disputes related to benefits accrued prior to the modification.").

Plaintiff admits signing the form acknowledging receipt of materials containing the new EDR Plan and an explanation of its procedures. Defendant's arbitration policy was not buried in the

employee handbook (although it was discussed there) but instead was a separate and distinct document sent to each individual employee, accompanied by cover materials introducing and explaining it. Further, the Plan clearly stated that it was the required and final means of resolving many serious disagreements, and defined the claims within its scope. Federal courts have upheld unilaterally implemented arbitration policies where employees had knowledge of their existence and indicated their assent by continued employment. See Durkin, 942 F.Supp. at 488 (an at-will employee's continued employment provided sufficient consideration for the arbitration provision); Venuto v. Insurance Co. of North America, No. 98-96, 1998 WL 414723 at *6 (E.D. Pa. July 22, 1998) (plaintiff-employee was deemed to have accepted employer's arbitration policy with respect to her ADA claim by her extended continued employment after she was notified of the policy's implementation); Kinnebrew v. Gulf Ins. Co., No. 3:94-CV-1517-R, 1994 WL 803508, at *2 (N.D. Tex. Nov. 28, 1994) ("federal courts do not hesitate to find an enforceable agreement to arbitrate when an arbitration policy is instituted during an employee's employment and the employee continues to work for the employer thereafter."). Accordingly, the Court finds that based upon the undisputed facts concerning the implementation and distribution of the EDR Plan and Plaintiff's signature on the acknowledgment form, Plaintiff knew of the Plan's existence and his continuing to work for Defendant for more than 18 months after the EDR Plan was implemented demonstrated his acceptance of its terms.

The court also rejects Plaintiff's argument that the contractual arbitration provision must fail for lack of consideration. Plaintiff's continued employment provided sufficient consideration here. In addition, "[t]he agreement of one party to a contract to arbitrate disputes is sufficient consideration to support the other party's agreement to do the same." Lacheney v. ProfitKey Int'l, 818 F.Supp. 922, 925 (E.D. Va. 1993); see also Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753, 758 (2d Cir.1967) ("Hellenic's promise to arbitrate was sufficient consideration to support Dreyfus's promise to arbitrate.").

Plaintiff also argues that because Defendant did not terminate Plaintiff when he failed to expressly assent to the Plan, estoppel or waiver principles prevent Defendant from now arguing that Plaintiff consented to the Plan by his continued employment. Plaintiff's argument is flawed because, as discussed previously, express consent to arbitration is not required. Further, Defendant filed its motion to dismiss or stay proceedings pending arbitration shortly after Plaintiff filed his complaint in federal district court, so the parties were still at the initial stages of the lawsuit. Defendant's conduct is not inconsistent with its pursuit of arbitration now. McWilliams, 143 F.3d 573, 576 (10th Cir. 1998). Moreover, in light of the Supreme Court's rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation or

[sic] waiver, delay, or a like defense to arbitrability," Moses H. Cone Memorial Hospital, 460 U.S. at 24-25, the Court concludes that Plaintiff has failed to allege sufficient facts which would support a finding that Defendant has waived its right to request arbitration or is estopped from moving to enforce arbitration.

Additionally, plaintiff contends that the EDR Plan is unconscionable because it is unfair and violates due process and statutorily protected rights. Plaintiff asserts that requiring him to quit employment rather than implicitly consent to arbitration by continuing employment demonstrates that the arbitration agreement is unfair and smacks of economic duress. However, "[m]ere inequality in bargaining power...is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." Gilmer, 500 U.S. at 33. Further, as noted above, other courts have rejected Plaintiff's argument and upheld arbitration agreements based upon an employee's continued employment. See e.g., Veneto, 1998 WL 414723; see also Geldermann v. Commodity Futures Trading Commission, 836 F.2d 310 (7th Cir. 1987) (concluding commodity broker "voluntarily" accepted arbitration mandated by the federal government in that he could have chosen a different career in order to avoid arbitration). The Court concludes that Plaintiff's implicit consent to arbitration was not obtained by economic duress.

Plaintiff also propounds various reasons why the Plan is unfair (e.g., he is required to pay $100 as an initial filing fee, although Defendant pays all other costs of arbitration; discovery

may be more limited than in federal court). After review of the Plan's provisions, the Court finds that they are not so unfair or unreasonable as to offend public policy. Cf., Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999) (court held arbitration agreement unenforceable because employee would be required to pay half of arbitrator's fees; his portion was estimated at $1,875-$5,000).

Plaintiff also expresses concern that any arbitration action will be dismissed as untimely because mediation was not sought within 90 days of the discriminatory act. However, Defendant has indicated it is willing to stipulate that it will not attempt to preclude the arbitration of any claims that could be litigated if this case remained pending in federal court. Thus, Plaintiff's concern over the EDR Plan's filing deadline is moot.

Scope of the Arbitration Agreement

Having determined that the EDR Plan is an enforceable agreement, the Court next turns to whether the Plan embraces the claims raised in Plaintiff's Complaint. The broad language of ¶ 4B of the Plan clearly encompasses Plaintiff's legal and equitable claims relating to his employment, and specifically includes "allegations of: discrimination based on race, sex, religion, age, ethnic origin, national origin, disability or handicap; sexual or other harassment;...infliction of emotional distress...[and] wrongful discharge or wrongful termination." The Tenth Circuit has sanctioned the mandatory arbitration of employment claims such as those presented by Plaintiff. Shankle, 163 F.3d 1230 (endorsing

the arbitration of statutory employment claims in general); McWilliams, 143 F.3d 573 (ADA claims); Armijo v. Prudential Ins. Co. of America, 72 F.3d 793 (10th Cir. 1995) (Title VII race, sex, and national origin claims). Thus, the Court finds that Plaintiff's claims are subject to arbitration under the provisions of the EDR Plan.

Conclusion

In summary, the Court finds that the arbitration provisions of the EDR Plan are effective and that the claims alleged in Plaintiffs' Complaint are subject to arbitration under that Plan. The Court therefore finds the arbitration provisions enforceable under the Federal Arbitration Act, 9 U.S.C. § 2.

Defendant, in its motion, requests either dismissal of Plaintiff's Complaint for lack of subject matter jurisdiction or stay of this action pending arbitration. Upon due consideration, the Court concludes that Defendant's request for stay should be granted. A stay pending arbitration is statutorily provided for in 9 U.S.C. § 3. That section specifically provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (Emphasis Added). Because the stay is statutorily authorized and Defendant has alternatively requested such relief,

the Court concludes that a stay should be granted. Although the Court finds that stay should be granted, the Court, for statistical purposes, shall direct the Clerk of the Court to administratively close this matter in his records pending resolution of the arbitration proceedings.

Based upon the foregoing, all of Plaintiff's claims alleged in the Complaint against Defendant, Bridgestone/Firestone, Inc., are referred to mediation/arbitration in accordance with the terms of the EDR Plan. The Motion to Dismiss filed by Defendants (Docket Entry #5-1) is **DENIED**. The Motions to Stay Pending Arbitration (Docket Entry #5-2) and to Compel Mediation and Arbitration (Docket Entry #5-3) are **GRANTED**. For statistical purposes, the Court **ORDERS** the Clerk of the Court to administratively close this matter in his records pending arbitration of this matter. The parties are **DIRECTED** to notify the Court upon resolution of the arbitration so that the Court may obtain a final resolution of this litigation, if necessary.

Entered this 7th day of December, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA R. TERRY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 99-CV-125-E**
	)	
BOARD OF COUNTY COMMISSIONERS OF OTTAWA COUNTY and **BEVERLY STEPP,** in her official capacity as Court Clerk of Ottawa County,	)	
	)	
Defendants.	)	

DEFAULT JUDGMENT

Plaintiff's Motion for Award of Attorney's Fees was granted on November 30, 1999 and an Order awarding fees was entered on the docket on December 1, 1999.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, in accordance with its November 30, 1999 order, that plaintiff Debra R. Terry be awarded default judgment against the defendants Board of County Commissioners of Ottawa County and Beverly Stepp in her official capacity as Court Clerk of Ottawa County for attorney's fees in the amount of $4,699.00, with post-judgment interest thereon at the rate of 5.471% per annum..

ORDERED this 6th day of December, 1999.

JAMES O. ELLISON
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD A. DREHER,)
)
Petitioner,)
)
vs.) Case No. 97-CV-502-H
)
STEVE HARGETT,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

This 6TH day of DECEMBER, 1999.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD A. DREHER,)
)
Petitioner,)
)
vs.) Case No. 97-CV-502-H
)
STEVE HARGETT,)
)
Respondent.)

ORDER

This is an action on a 28 U.S.C. § 2254 petition for writ of habeas corpus. Petitioner appears *pro se*. By Order entered August 14, 1998 (Dkt. #10), the Court dismissed the petition with prejudice as barred by the statute of limitations imposed by 28 U.S.C. § 2244(d). Petitioner appealed and on February 3, 1999, the United States Court of Appeals for the Tenth Circuit filed its Order (#15) remanding the case for a determination as to the date prison officials received Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus for mailing. On remand, this Court directed Respondent to provide a copy of the appropriate prison mail log(s) as well as any other evidence demonstrating the date prison officials received the petition for mailing and to brief the legal significance of the information to the timeliness of Petitioner's petition under 28 U.S.C. § 2244(d). The Court also directed Petitioner to file a response to Respondent's brief. The parties have submitted their briefs (#s 17 and 20) in compliance with the Court's directives. For the reasons discussed below, the Court finds that this petition was not filed within the one-year limitations period and should be dismissed with prejudice.

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ANALYSIS

As determined by the Tenth Circuit Court of Appeals, Petitioner's deadline for submitting his habeas corpus petition fell on Saturday, May 17, 1997. See #15. However, because the last day of computation for a filing date shall not be included if it falls on a Saturday or Sunday, Fed. R. Civ. P. 6(a), Petitioner's deadline for filing his habeas petition was extended to Monday, May 19, 1997. Petitioner executed his petition on May 19, 1997 and the petition was file-stamped by the Clerk of this Court on May 27, 1997. See #1.

The Tenth Circuit Court of Appeals has recognized that a prisoner's § 2254 petition is deemed filed on the date he delivers it to prison authorities for mailing. See Hoggro v. Boone, 150 F.3d 1223, 1227 n.3 (10th Cir. 1998) (citing Houston v. Lack, 487 U.S. 266, 270 (1988)). Thus, in the instant case, if Petitioner delivered his petition to prison authorities for mailing on May 19, 1997, the date he executed the petition, the petition would be deemed filed on May 19, 1997 and would be timely.

In his "supplemental brief in support of motion to dismiss for lack of jurisdiction" (#17), Respondent continues to assert that this petition is untimely and must be dismissed. In support of his argument, Respondent provides a copy of an entry made in the Outgoing Legal Log, as maintained by prison authorities at Lexington Correctional Center, the facility where Petitioner was incarcerated during the relevant time period. That entry, copied and verified by the prison's Postal Clerk Supervisor, indicates that Petitioner had outgoing legal mail on May 22, 1997 to the "Crt Clk (ND) Tulsa 3.00." (#17, Ex. A.) In his "response in traverse" (#20), Petitioner offers no evidence to contradict the outgoing mail log, but argues that "this court must assume that Petitioner was honest and placed the envelope in the legal mail box on the very same day that he signed and dated

the execution -- May 19, 1997."

Based on the entry on the prison mail log, the Court finds that prison officials received the petition for mailing on May 22, 1997, or three (3) days after the May 19, 1997 filing deadline. That conclusion is supported by other filings and materials maintained as part of the record in this case. Specifically, the record indicates that both the petition (#1) and Petitioner's motion for leave to proceed *in forma pauperis* (#2) were received for filing and file-stamped on the same day, May 27, 1997. Petitioner executed the *in forma pauperis* motion on May 20, 1997 and the Statement of Institutional Accounts, provided in support of the motion, is dated May 21, 1997. (#2 at 3.) The court file also contains one envelope, with $3.00 in postage affixed, mailed from Lexington, OK, on May 22, 1997 and addressed to "Court Clerk, Northern District Court, Federal Courthouse, Tulsa, OK 74103." Petitioner's return address is on the envelope. These materials lend support to the conclusion that prison officials received the petition for mailing on May 22, 1997, or three (3) days beyond the May 19, 1997 deadline. As a result, the Court finds that the petition was not timely filed and should be dismissed with prejudice as barred by the § 2244(d) statute of limitations.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is **dismissed with prejudice** as barred by the § 2244(d) statute of limitations.

IT IS SO ORDERED.

This 6TH day of December, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN JAY GOOCH,)
)
Petitioner,)
)
vs.) Case No. 97-CV-223-H
)
STEPHEN KAISER, Warden,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 6TH day of December, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN JAY GOOCH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-CV-223-H
	)	
STEPHEN KAISER, Warden,	)	
	)	
Respondent.	)	

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, a prisoner in the custody of the Oklahoma Department of Corrections, challenges his convictions entered in Delaware County District Court, Case Nos. CF-94-91, CF-94-93, CF-94-94, CF-95-66, and CM-94-425. Respondent has filed a Rule 5 response (#7). Petitioner has filed a reply (#10). Petitioner has also filed a "petition for ruling" (#12). For the reasons discussed below, the Court finds that this petition should be denied. Today's decision renders Petitioner's "petition for ruling" moot.

BACKGROUND

On March 30, 1994, Highway Patrol Trooper Scott Green stopped Petitioner for speeding in Delaware County, Oklahoma. (Trans. 37-38.) As he was preparing to issue a warning to Petitioner, Green detected an odor of marijuana. (Trans. at 38-39.) He also noted that Petitioner was "very fidgety, nervous acting." (Trans. at 40.) Green asked Petitioner if he had anything illegal in his vehicle such as drugs, weapons, guns or other contraband. Petitioner denied having anything illegal and declined to give permission to Trooper Green to search his vehicle. (Trans. at 39.) Green

radioed Mike Wilkerson, Chief of Police for West Siloam Springs, Oklahoma, for assistance (Trans. 41, 285-86.) Wilkerson had his drug dog with him at the time. (Trans. at 41.) The drug dog searched Petitioner's vehicle (Trans. 40-41), and gave an "aggressive alert" to a brown suitcase located in the vehicle. (Trans. at 44.) The dog's behavior indicated he had detected an odor associated with a controlled dangerous drug. (Id.) Green removed the suitcase from the vehicle and looked inside. (Trans. at 47.) He found that it contained a white box bearing Petitioner's name and address. (Trans. at 46.) The white box contained seven (7) baggies containing a total of approximately 22.01 grams of a white-tannish powder which tested positive as methamphetamine, three (3) baggies containing a total of approximately 128.2 grams of a green leafy plant material which tested positive as marijuana, rolling papers, a pill bottle containing approximately 17.6 grams of seeds and plant material which tested positive as marijuana, and four small squares containing a substance which tested positive as Lysergic Acid Diethylamide, or LSD. (Trans. 49-50, 55-65, 181, 187-193, 197.)

Petitioner was convicted by a jury of the following crimes and was sentenced as indicated: Case No. CF-94-91, Unlawful Possession of Marijuana with Intent to Distribute (40 years and $20,000 fine); Case No. CF-94-93, Dealer Transporting or Possessing a Controlled Dangerous Substance without a Tax Stamp (20 years); Case No. CF-94-94, Trafficking (50 years and $100,000 fine); Case No. CF-95-66, Unlawful Possession of Controlled Drug (50 years and $50,000 fine), all After Former Conviction of Two or More Felonies.[1] In Case No. CM-94-425, the jury also found Petitioner guilty of Unlawful Possession of Paraphernalia, a misdemeanor, for which Petitioner

[1]Petitioner had two (2) prior felony convictions: (1) Burglary and Theft of Property in Case No. CR-80-203, in the Circuit Court of Benton County, Arkansas, and (2) Burglary in Case No. CR-80-301, in the Circuit Court of Benton County, Arkansas.

received a sentence of 9 months and a $1000 fine. The sentences entered for CF-94-93 and CF-95-66 were to be served concurrently. All other sentences were ordered to be served consecutively.

Petitioner perfected a direct appeal where he raised the following eleven (11) propositions of error:

I. The warrantless search was illegal; therefore, the trial court erred by allowing the evidence found as a result of the search to be introduced at trial.

II. There was a break in the chain of custody as to the LSD evidence; accordingly, no LSD evidence should have been admitted at trial and the charge for unlawful possession of a controlled dangerous substance should have been dismissed.

III. Appellant was convicted under a statute which is unconstitutional as written.

IV. The instruction regarding paraphernalia unconstitutionally shifted the burden of proof.

V. The trial judge erred by allowing the state's witnesses to testify on ultimate issues of fact.

VI. The Tax Stamp Act is unenforceable because the regulations required to implement it have not been promulgated.

VII. Oklahoma's law requiring a tax stamp to be placed on controlled dangerous substances is unconstitutional.

VIII. The evidence was insufficient to support the charge of unlawful possession of marijuana with intent to distribute.

IX. The trial court erred by failing to give any lesser-included instructions on the charges of trafficking and unlawful possession of marijuana with intent to distribute.

X. The sentences are excessive.

XI. The trial court erred in allowing the jury to assess punishment for the misdemeanor unlawful possession of paraphernalia charge after presentation of appellant's prior felony convictions in the second stage of trial.

(#7, Ex. B.) On November 22, 1996, in an unpublished summary opinion, the Oklahoma Court of

Criminal Appeals ("OCCA") affirmed Petitioner's felony convictions and sentences, but reversed and remanded the misdemeanor conviction for a new trial. (#7, Ex. A.)

Petitioner filed the instant petition on March 13, 1997. Rather than specifically identifying separate grounds of error, Petitioner simply refers to the propositions of error raised in his direct appeal brief, attached to his petition as "Appendix B." In response to the petition, Respondent argues that Petitioner's first claim, concerning the trial court's failure to suppress evidence obtained as the result of an allegedly illegal stop, is not cognizable in this habeas corpus proceeding because Petitioner was afforded a full and fair opportunity to litigate the claim in state court; claims II, V, and VI involve questions of state law and are not cognizable in a federal habeas corpus action; claims III, IV and XI relate to the reversed misdemeanor conviction and are moot; and habeas corpus relief cannot be granted as to claims VII, VIII, IX and X. In reply to the response, Petitioner asserts only that his Fourth Amendment claim concerning the legality of the traffic stop is valid and that all evidence acquired as a result of the illegal stop should have been suppressed (#10).

ANALYSIS

A. Exhaustion and Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). Respondent concedes and the Court finds Petitioner has presented each of his claims to the OCCA on direct appeal and meets the exhaustion requirement of § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

In addition, the Court finds Petitioner is not entitled to an evidentiary hearing on his claims. Nothing in the record indicates that Petitioner was denied an evidentiary hearing in state court. As

a result, this Court cannot hold an evidentiary hearing unless Petitioner satisfies the showing prescribed by 28 U.S.C. § 2254(e)(2).[2] After reviewing Petitioner's claims and the relevant record, the Court finds Petitioner has failed to make the necessary showing and is not entitled to an evidentiary hearing under § 2254(e)(2).

B. Standard of review under the AEDPA

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the OCCA unless the adjudication of the claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). As discussed above, Petitioner raised each of his claims on direct appeal. The state appellate court considered the merits of each claim. Although the OCCA reversed and remanded Petitioner's misdemeanor conviction, the court rejected Petitioner's challenges to his felony

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[2] 28 U.S.C. § 2254(e)(2) provides as follows:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

convictions, stating that "after a thorough consideration of [the] propositions and the entire record before us on appeal, including the original record, transcripts and briefs of the parties . . . . [t]he felony convictions are **AFFIRMED.**" (#7, Ex. A.) Therefore, unless the Court of Criminal Appeals's adjudication of the claims related to the felony convictions was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," this Court must deny the requested habeas relief as to those claims. 28 U.S.C. § 2254(d).

C. Claims rejected by the OCCA on the merits

1. Challenge to admission of evidence obtained as result of illegal stop (claim I)

In Stone v. Powell, 428 U.S. 465, 494 (1976), the Supreme Court stated that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. The Tenth Circuit has reiterated that a federal habeas corpus court need not address a Fourth Amendment question as long as the state court has given petitioner a full and fair opportunity for a hearing on the issue. Miranda v. Cooper, 967 F.2d 392, 400-01 (10th Cir.1992).

In this case, the record demonstrates that during Petitioner's trial, after the State rested, defense counsel moved for a demurrer to the evidence on the basis that the initial stop of Petitioner was pretextual and therefore illegal. (Trans. at 324.) While arguing for a demurrer, counsel acknowledged that this same argument had been presented and rejected during a preliminary hearing.

(See Trans. at 326.) Also, on direct appeal before the OCCA, Petitioner argued as his first proposition of error that the traffic stop was pretextual and that his resulting arrest was illegal in violation of the Fourth Amendment. As a result, Petitioner asserted that any evidence against him obtained as a result of the stop should have been excluded at trial. However, in affirming Petitioner's felony convictions, the OCCA considered and rejected Petitioner's claim on the merits. (#7, Ex. A.) Based on the record, the Court finds that the state courts gave Petitioner a full and fair opportunity to litigate his Fourth Amendment claim and, under Stone v. Powell, federal habeas corpus review is barred. Petitioner's application for a writ of habeas corpus must be denied as to the first proposition of error.

2. Evidentiary rulings by trial court (claims II and V)

In his second and fifth propositions of error identified in his state direct appeal brief, Petitioner alleged that his right to due process was violated by the admission of certain evidence during his trial. Specifically, Petitioner alleged as his second claim that no LSD evidence should have been admitted at trial because there was a break in the chain of custody and as his fifth claim that the State's witnesses were allowed to testify on ultimate issues of fact concerning the significance of the packaging of the marijuana found in Petitioner's possession.

As an initial matter, Petitioner has failed to assert a basis for finding that the OCCA's rejection of these claims on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, "[i]n a habeas proceeding claiming a denial of due process, 'we will not question the evidentiary ... rulings of the state court unless [the petitioner] can show that, because of the court's actions, his trial, as a whole, was rendered fundamentally unfair.' " Maes v. Thomas, 46 F.3d 979,

987 (10th Cir.1995) (quoting Tapia v. Tansy, 926 F.2d 1554, 1557 (10th Cir.1991)). "[W]e approach the fundamental fairness analysis with 'considerable self-restraint.' " Jackson v. Shanks, 143 F.3d 1313, 1322 (10th Cir.) (quoting United States v. Rivera, 900 F.2d 1462, 1477 (10th Cir.1990) (*en banc*)), *cert. denied*, 119 S.Ct. 378 (1998). A proceeding is fundamentally unfair under the Due Process Clause only if it is " 'shocking to the universal sense of justice.' " United States v. Tome, 3 F.3d 342, 353 (10th Cir.1993) (quoting United States v. Russell, 411 U.S. 423, 432 (1973) (internal quotation omitted)).

Chain of custody issues such as those raised here turn on interpretations of state law and are generally not cognizable under 28 U.S.C. § 2254. See, e.g., Summer v. Mata, 455 U.S. 591 (1982); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). Where an object has been sufficiently identified to establish relevance, arguments concerning breaks in the chain of custody generally go to the weight of the evidence, not its admissibility. It is not strictly necessary, as a matter of constitutional law, to prove that the object is what it is alleged to be before admitting the object. In this case, a sufficient chain of custody was established to find that there was a reasonable probability that the LSD introduced was the LSD found in the possession of Petitioner. Thus, even if the evidence was not properly admissible under state law, Petitioner has failed to demonstrate that it was fundamentally unfair to admit the LSD evidence. Whether the perforated strips introduced at trial were the strips seized from Petitioner was for the jury to decide. The Court concludes that habeas corpus relief on this ground should be denied.

Similarly, Petitioner's claim concerning the trial court's admission of the testimony of the State's witnesses is not cognizable in this habeas corpus proceeding. Petitioner complains that the testimony of Trooper Green, Forensic Chemist Dennis Reimer, and Chief of Police Mike Wilkerson

concerning the marijuana evidence should not have been admitted because their testimony went to the "ultimate issue" of Petitioner's guilt or innocence on the charge of possession with intent to distribute.

After reviewing the record in the instant case, the Court finds Petitioner has failed to demonstrate that his trial was rendered fundamentally unfair as a result of the admission of the identified testimony. As to Trooper Green's testimony concerning the "packed" condition of some of the marijuana, the trial court sustained defense counsel's objections to the testimony. (Trans. at 71.) Dennis Reimer, the forensic chemist, testified that the use of separate bags indicated the marijuana was intended to be consumed at separate places, at separate times, and by separate people. (Trans. at 205.) Chief Wilkerson testified that in his opinion, the bags of marijuana found in Petitioner's possession were packaged consistent with an intent to sell or distribute. (Trans. at 273.) In Barefoot v. Estelle, 463 U.S. 880, 898-99 (1983), the Supreme Court found expert psychiatric testimony to be constitutional despite its uncertain reliability because the defense could question the witness's reliability and the jury, presented with both sides, could decide how much to credit the testimony. Here also, the defense had a full and fair opportunity to question the reliability and usefulness of the lay witnesses' opinions. The jury members then made up their own minds whether and how much to rely on that testimony. Thus, the admission of the testimony was not fundamentally unfair and did not violate Petitioner's right to due process. Habeas corpus relief on this basis should be denied.

3. Challenges to Oklahoma's Tax Stamp Act (claims VI and VII)

In claims VI and VII, Petitioner challenges his conviction in Case No. CF-94-93, Dealer Transporting or Possessing a Controlled Dangerous Substance without a Tax Stamp (20 years). Petitioner maintains that the Oklahoma Tax Stamp Act (the "Act") is unenforceable because implementation rules have not been promulgated and the Act is unconstitutional as it violates the right against self-incrimination and the right to be free of double jeopardy.

As with his other claims rejected by the OCCA on direct appeal, Petitioner has failed to assert a basis for issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, after reviewing the record, the Court finds nothing to indicate that the OCCA's resolution of these claims warrants issuance of the writ. Petitioner's claim concerning the alleged failure of the Oklahoma Tax Commission to promulgate implementation rules is a question of state law. A state court's resolution of questions of state law is not the proper subject for federal habeas corpus review. Estelle v. McGuire, 502 U.S. 62, 63 (1991). The OCCA rejected Petitioner's claim that the tax stamp conviction is void because the Act is unenforceable. Petitioner has failed to present any evidence or argument to indicate that the alleged failure to promulgate implementation rules deprived him of a fair trial in violation of the Constitution.

Petitioner also challenges the constitutionality of the Act, alleging violations of the right against self-incrimination and the prohibition against double jeopardy. The OCCA has squarely rejected identical challenges to the constitutionality of the Act. See White v. State, 900 P.2d 982, 987-88 (Okla. Crim. App. 1995) (finding no violation of either the right against self-incrimination or the prohibition against double jeopardy where a defendant is punished for both failing to pay drug tax and committing drug offense all in the same proceeding). The Court finds the OCCA's analysis

to be consistent with Supreme Court precedent. See Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994); Marchetti v. United States, 390 U.S. 39, 47-48 (1968). Habeas corpus relief on these claims should be denied.

4. Challenge to sufficiency of the evidence (claim VIII)

As his eighth proposition of error identified in his direct appeal brief, Petitioner argued that the evidence was insufficient to support his conviction for Possession of Marijuana with Intent to Distribute. Again, Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

> . . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). In evaluating the evidence presented at trial, the Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the

prosecution," Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

In the instant case, the jury heard testimony and viewed evidence concerning the drugs found in Petitioner's vehicle. After a drug sniffing dog alerted to a suitcase found in Petitioner's vehicle, law enforcement officers found a white cardboard box with Petitioner's name and address on it in the suitcase. (Trans. at 44-47, 110-113, 236-37.) Inside the box was a baggie containing a green leafy substance. In addition, two more baggies were found in the box, each containing a green leafy substance, as well as some rolling papers. (Trans. at 45-46, 51-52, 56-58.) The box also contained eight small empty baggies. (Trans. at 84.) The Court concludes that this evidence, when viewed in a light most favorable to the State, was sufficient to allow the jury as a rational trier of fact to have found the essential elements of Possession of Marijuana with Intent to Distribute beyond a reasonable doubt. Petitioner has failed to demonstrate that the OCCA's resolution of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. As a result, the Court finds habeas corpus relief should be denied on this claim.

5. Challenge to jury instructions (claim IX)

As his ninth proposition of error on direct appeal, Petitioner alleged that the trial court erred by failing to instruct the jury on the lesser included offense of simple possession of marijuana and on any lesser charge to trafficking. In the instant action, Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). After reviewing the record, the Court finds habeas relief is not warranted under

§ 2254(d). Petitioner is not entitled to habeas relief based on the trial court's failure to give a lesser-included offense instruction. See Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir.1993) (petitioner in non-capital case not entitled to habeas relief for failure to give lesser-included offense instruction even if habeas court were to find sufficient evidence to warrant giving instruction on lesser-included offense). Accordingly, habeas corpus relief on this claim should be denied.

6. Petitioner's sentences are not excessive (claim X)

As the tenth proposition of error raised on direct appeal, Petitioner argued that his sentences should be modified because "the punishment does not bear a direct relationship to the nature and circumstances of the offense." (#7, Ex. B at 46.) In affirming Petitioner's felony convictions and sentences, the OCCA rejected this claim. As with each of his other claims, Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d).

Petitioner was sentenced pursuant Okla. Stat. tit. 21, § 51(B). Prior to its repeal, effective July 1, 1999, that statute provided that "[e]very person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years." Okla. Stat. tit. 21, § 51(B) (West 1983). Thus, the statute defines a minimum sentence, 20 years, but provides no cap or upper limit.

The length of sentences imposed for crimes classified as felonies is properly determined by legislatures. Hutto v. Davis, 454 U.S. 370, 374 (1982). Federal courts should rarely review legislatively mandated terms of imprisonment. Id. at 374. The sentences received by Petitioner in

this case were within the range of punishment allowed under Oklahoma law. Because Petitioner's sentences comport with the mandate of the Oklahoma Legislature, the Court finds his sentences were not excessive and that habeas corpus relief on this claim should be denied.

D. Challenges to misdemeanor conviction are moot (claims III, IV and XI)

In his third, fourth and eleventh claims raised on direct appeal, Petitioner challenged his conviction entered in CM-94-425, the misdemeanor offense of Unlawful Possession of Paraphernalia. The OCCA found that because the jury instruction regarding paraphernalia made no mention of the intent to use the paraphernalia in an illegal manner and failed to inform the jury that the prosecution had the burden of proving Petitioner's intent to use the paraphernalia in an illegal manner, the instruction unconstitutionally shifted the burden of proof. As a result, the state appellate court reversed the conviction and remanded for a new trial. See #7, Ex. A.

Because the OCCA reversed Petitioner's conviction entered in CM-94-425, the conviction no longer exists and the claims raised in the instant petition have been rendered moot. The OCCA has already afforded Petitioner all the relief possible on these claims. Petitioner presents no argument suggesting otherwise. Habeas corpus relief on these claims must be denied because relief cannot be granted on a conviction which no longer exists.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**. Petitioner's "petition for ruling" (#12) is **moot**.

IT IS SO ORDERED.

This 6TH day of DECEMBER, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS PATRICK JACKSON,)
)
Petitioner,)
)
vs.) Case No. 97-CV-294-H
)
RON J. WARD,)
)
Respondent.)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 6TH day of DECEMBER, 1999.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS PATRICK JACKSON,)
)
Petitioner,)
)
vs.) Case No. 97-CV-294-H
)
RON J. WARD,)
)
Respondent.)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his convictions in Tulsa County District Court, Case No. CRF-87-1396. On November 12, 1997, Petitioner filed his Amended Petition (#9). Respondent has filed a Rule 5 response to the amended petition (#15) to which Petitioner has replied (#16). As more fully set out below, the Court concludes that this petition should be denied.

As an initial matter, it has come to the Court's attention that Petitioner paid the $5.00 filing fee required to commence this action in the United States District Court for the Eastern District of Oklahoma (receipt # 128414), where he originally filed his petition. After the case was transferred to this Court, Petitioner paid a second $5.00 filing fee (receipt # 76101). Because the second payment of $5.00 was an overpayment, the Court finds that the Clerk should be directed to refund $5.00 to Petitioner.

BACKGROUND

Petitioner entered a plea of guilty to First Degree Rape (Count I), Forcible Sodomy (Count II), Assault and Battery With a Dangerous Weapon (Count III), and Kidnapping (Count IV), all After Three Prior Felony Convictions. On May 14, 1987, in accordance with the plea agreement, Petitioner was sentenced to forty (40) years incarceration on each count, with Counts I and II to be served concurrently, and Counts III and IV to be served concurrently but consecutive to Counts I and II. Throughout the criminal proceedings in state district court, Petitioner was represented by court-appointed counsel from the Tulsa County Public Defender's Office. Petitioner did not move to withdraw his guilty plea and otherwise failed to perfect a direct appeal.

On August 6, 1987, Petitioner filed an application for post-conviction relief alleging that (1) the trial court failed to advise him of his constitutional right against compulsory self-incrimination, and (2) the trial court failed to advise him of the nature and consequences of entering a guilty plea. On October 23, 1987, the trial court denied relief. Citing Mains v. State, 597 P.2d 774 (Okla. Crim. App. 1979), Webb v. State, 661 P.2d 904 (Okla. Crim. App. 1983), and Jones v. State, 704 P.2d 1138 (Okla. Crim. App. 1985), the trial court stated that despite having been advised of his appeal rights, Petitioner failed to seek or perfect an appeal, "nor has the Petitioner offered any reason for his failure to file a timely direct appeal of his convictions . . . [t]herefore, the Court finds that the petitioner has waived these issues and his Application is denied." (#15, attachment to Ex. A.) Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals ("OCCA"). On December 4, 1987, the OCCA affirmed the denial of post-conviction relief. (#15, Ex. A.)

More than five (5) years later, on August 12, 1993, Petitioner filed a second application for post-conviction relief alleging that (1) there was a conflict of interest between Petitioner, the victim, and Petitioner's counsel because Petitioner is a black man, the victim was a white woman and Petitioner's court-appointed attorney was a white woman; (2) Petitioner was not competent to enter a plea of guilty; and (3) Petitioner was denied the right to be treated by a doctor prior to entry of the plea. The state district court denied the requested relief on October 29, 1993. Petitioner appealed and on February 11, 1994, the OCCA affirmed the denial of post-conviction relief, citing Okla. Stat. tit. 22, § 1086 and finding that Petitioner had "failed to provide this Court with sufficient reason concerning why these grounds for relief were not asserted or were insufficiently raised in prior proceedings." (#15, Ex. B.)

Respondent indicates that Petitioner filed a third application for post-conviction relief in the trial court. However, Petitioner did not appeal the trial court's denial of the requested relief.

In his fourth application for post-conviction relief, filed July 18, 1995, Petitioner alleged that (1) neither the trial court nor trial counsel advised him of the rights he was relinquishing by pleading guilty, and (2) he was not given his Miranda rights when he was arrested. The state district court denied post-conviction relief. Petitioner appealed and on November 1, 1995, the OCCA affirmed the denial of relief, finding as follows:

> [Petitioner] has not raised any issues that he could not have raised in a motion to withdraw guilty plea and in an appeal of his conviction. Hale v. State, 807 P.2d 264, 266-67 (Okl.Cr. 1991). He has failed to state any reasons why the issues now raised were not asserted or were inadequately raised in a direct appeal or in his three (3) previous applications for post-conviction relief. Therefore the current issues may not be the basis of this subsequent application for post-conviction relief. 22 O.S. 1991, § 1086; Hale, supra. Accordingly, the order of the District Court denying Petitioner's fourth application for post-conviction relief should be, and is hereby, AFFIRMED."

(#15, Ex. C.)

On December 30, 1996, Petitioner filed his habeas corpus petition in the United States District Court for the Eastern District of Oklahoma. On March 27, 1997, the case was transferred to this Court. On November 12, 1997, Petitioner filed his amended petition (#9) raising three claims: (1) ineffective assistance of counsel, (2) the trial judge failed to advise him of his legal rights and to develop the factual basis for the underlying crimes, and (3) Petitioner was not advised of his Miranda rights at the time of his arrest, nor was he served with an arrest warrant. Respondent has filed a response (#15) to the amended petition asserting that this Court is barred from considering Petitioner's claims based on the doctrine of procedural default. Petitioner has replied to Respondent's response (#16).

ANALYSIS

A. Applicability of the Antiterrorism and Effective Death Penalty Act ("AEDPA")

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner initially filed his petition for writ of habeas corpus on December 30, 1996, after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.[1]

B. Exhaustion/Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

[1]Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998). In denying Petitioner's application for post-conviction relief, the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony." (#15, attachment to Ex. A.) Thus, the state court denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by pre-AEDPA standards rather than by 28 U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

C. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501

U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

1. Petitioner's second and third claims

As his second proposition of error raised in the amended petition, Petitioner states that fundamental error occurred when the trial judge accepted his guilty plea without developing the factual basis for the plea. As his third claim, Petitioner asserts that he was neither advised of his Miranda rights nor served with an arrest warrant when he was arrested. These claims were first presented to the OCCA in Petitioner's fourth application for post-conviction relief. Respondent argues that Petitioner procedurally defaulted these claims when he failed to move to withdraw his guilty plea and perfect a direct appeal. In affirming the trial court's denial of post-conviction relief, the OCCA specifically found that Petitioner had waived his claims by failing to raise them in a direct appeal as required by Oklahoma procedural rules and that he had failed to provide the court sufficient reason for his failure to file a direct appeal. (#15, Ex. C.)

Applying the principles of procedural default to the instant case, the Court concludes Petitioner's second and third claims are procedurally barred. The state court's procedural bar as applied to these claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate"

state ground because the OCCA has consistently declined to review claims which could have been but were not raised on direct appeal. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's second and third claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In his reply to Respondent's response, Petitioner attempts to show cause for his procedural default by arguing that "his attorney and the court was (sic) not protecting his rights and explaining them to his as a competent attorney or judge would have." (#16 at 4). Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hickman v. Spears, 160 F.3d 1269, 1273 (10th Cir. 1998). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. at 688. In making this determination, a court must "judge . . . [a] counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner claims he was unable to perfect an appeal because his court-appointed trial counsel "caused him to deviate from the state's plea withdrawal procedures by failing to inform petitioner of the rights and manners related to WITHDRAWING HIS PLEA." (#16 at 4-5.) Petitioner further states that "it is axiomatic that if petitioner was informed that he could obtain counsel assistance in withdrawing his plea, he would have. And if petitioner was informed of how to obtain such assistance, he would have." (Id.) The Court finds these conclusory, unsupported efforts to demonstrate "cause" are inadequate to excuse the procedural default. Furthermore, Petitioner failed to assert this claim until his fourth application for post-conviction relief. In fact, this belated claim of ineffective assistance of counsel conflicts directly with representations made by Petitioner in his petition-in-error filed in the OCCA following the trial court's denial of his first application for post-conviction relief. In that petition-in-error, Petitioner acknowledged both that the trial court or his attorney advised him of his right to appeal and that the trial court or his attorney advised him of his right to appointment of counsel and preparation of a casemade at state expense for purposes of an appeal. See #15, attachment to Ex. A, response to No. 9(f), (g). Therefore, in light of the record, the Court concludes Petitioner has failed to demonstrate ineffective assistance of counsel as "cause"

to excuse his procedural default.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992). However, Petitioner does not allege that he is actually innocent of the crimes for which he was convicted. Therefore, the Court finds that the "fundamental miscarriage of justice" exception to the procedural default doctrine has no application to this case.

As a result of Petitioner's failure to demonstrate "cause and prejudice" or that a fundamental miscarriage of justice would occur if his claims are not considered, this Court is procedurally barred from considering Petitioner's second and third claims.

2. Petitioner's claim of ineffective assistance of counsel

As to Petitioner's first claim, i.e., that he received ineffective assistance of counsel, the alleged procedural default cited by Respondent results from Petitioner's failure to raise the claim not only in a direct appeal but also in his first application for post-conviction relief. When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed

the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

> Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred. Because Petitioner did not perfect a direct appeal after pleading guilty, this Court would not be precluded from considering this claim on the merits had Petitioner raised the claim in his first post-conviction action. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998); English, 146 F.2d at 1264. However, Petitioner did not present his ineffective assistance of counsel claim in his first post-conviction action thereby defaulting his claim a second time. When Petitioner did raise ineffective assistance of counsel claims in his second and fourth applications for post-conviction relief, the OCCA ruled that the claim had been waived as a result of Petitioner's failure to raise the claim in prior proceedings. That finding is an "independent" and "adequate" state procedural rule and this Court must recognize the default in this case.

As discussed above, Petitioner may overcome the procedural bar by demonstrating "cause and prejudice" to excuse the default or that a "fundamental miscarriage of justice" will occur if Petitioner's claim is not considered on the merits. Although Petitioner attempts to demonstrate cause

and prejudice to overcome any procedural bar resulting from his failure to perfect a direct appeal, he offers no explanation for his failure to assert his ineffective assistance of counsel claims in his first application for post-conviction relief. Also, as discussed above, Petitioner does not claim to be actually innocent of the crimes for which he was convicted. Finding nothing in the record indicating the existence of "cause" for Petitioner's procedural default, the Court concludes that consideration of Petitioner's ineffective assistance of counsel claim is procedurally barred.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes each of Petitioner's claims is procedurally barred. As Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus, as amended, is **denied**.
2. The Court Clerk is directed to refund $5.00 to the Oklahoma Department of Corrections, Oklahoma State Penitentiary, P.O. Box 97, McAlester, Oklahoma 74502-0097, for redeposit to the account of Thomas Patrick Jackson, DOC # 117602.

IT IS SO ORDERED.

This 6TH day of DECEMBER, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT M. DANIELS,
SSN: 414-78-9703,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-897-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 6th day of Dec., 1999.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT M. DANIELS,
SSN: 414-78-9703,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

DEFENDANT.

CASE NO. 98-CV-897-M

ORDER

Plaintiff, Robert M. Daniels, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[1] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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[1] Plaintiff's August 24, 1995 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held November 14, 1996. By decision dated February 11, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 19, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 1, 1945 and was 51 years old at the time of the hearing. [R. 35, 94]. He claims to have been unable to work since January 2, 1992, due to carpal tunnel syndrome, hernia, hypertension, manic depression and bipolar disorder. [R. 54-55, 94, 146].

The ALJ determined that Plaintiff has severe impairments consisting of carpal tunnel syndrome and hypertension but that he retained the residual functional capacity (RFC) to perform the full range of light work except for work requiring repetitive pushing or pulling of arm controls, marked temperature extremes, vibration, repetitive hand motion or more than occasional driving. He determined Plaintiff would have a moderate limitation in his ability to grip and finger with his left hand and a mild limitation in his ability to grip and finger with his right hand. [R.22]. The ALJ concluded that Plaintiff was unable to return to his past relevant work (PRW) but determined, based upon the testimony of a vocational expert (VE), that a significant

number of jobs exist in the economy that Plaintiff could perform with those limitations. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 22]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's finding that Plaintiff did not have a severe mental impairment is not supported by substantial evidence and that the testimony of the vocational expert is insufficient to support the ALJ's finding that alternative jobs exist that Plaintiff can perform. For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff's First Statement of Error

Plaintiff claims the ALJ's finding that Plaintiff did not have a severe mental impairment is not supported by substantial evidence. The Court disagrees.

In reviewing the record, the ALJ took note of Plaintiff's mental condition which, he found, has resulted in slight restrictions of activities of daily living, no difficulties in maintaining social functioning, seldom deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner and no episodes of deterioration or decompensation in work or work-like settings. He noted also, that the most recent treatment records from Parkside Psychiatric Hospital reflected Plaintiff's condition was stabilized on medication. This is a faithful recap of the record evidence. [R. 71(daily activities include reading); R. 72(plays cards with friend); R. 73(cooks breakfast); See also, Record at 153, 425-427]. The ALJ found Plaintiff's bipolar

disorder and manic depression are no more than mild and are well controlled with medication, no more than minimally affecting Plaintiff's ability to engage in work related activities. [R.19].

Plaintiff underwent a consultative mental examination by Thomas A. Goodman, M.D. on August 21, 1996. [R. 396-413]. Plaintiff asserts the ALJ was required to rely upon a notation on the Psychiatric Review Technique Form (PRT)[2] filled out by Dr. Goodman indicating that Plaintiff "often" experienced deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere). [R. 412]. While Dr. Goodman did indicate this limitation, he also marked on a Mental RFC Assessment form that Plaintiff's ability to carry out detailed instructions, to maintain attention and concentration for extended periods, to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances, to interact appropriately with the general public and to respond appropriately to changes in the work setting, were no more than moderately limited. [R. 402-403]. And, in the body of his narrative report regarding his examination and evaluation of Plaintiff's mental condition, Dr. Goodman reported Plaintiff "admits his psychological problems do not prevent him from working" and that

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[2] The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. *See* 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d).

he "tend[s] to agree with him." [R. 398]. Dr. Goodman concluded Plaintiff retained his basic intellectual abilities and "as long as he remains free from the use of either alcohol or drugs and stays in treatment in Parkside Mental Health Clinic, [the doctor sees] no reason why he cannot return to the same level of work that he has always done." [R. 399]. The ALJ did not err in refusing to find that a single notation on the PRT form by the consultative examiner established a severe mental impairment. As is required at every adjudicative step of the disability determination process where a mental impairment is alleged, the ALJ completed a PRT form which he attached to his decision. And, in the narrative portion of his decision, the ALJ specifically stated that Plaintiff's affective disorder did not cause significant vocational limitations. He discussed the findings of Dr. Goodman as well as Plaintiff's treatment history. The ALJ's PRT and findings expressed in his decision are supported by the medical record. Thus, the ALJ's determination that Plaintiff's mental condition is not severe is supported by substantial evidence.

Plaintiff's Second Statement of Error

Plaintiff contends the testimony of the VE is flawed because the ALJ did not incorporate his medically established mental impairment into the hypothetical question he relied upon in determining Plaintiff was not disabled. This argument is also without merit.

Plaintiff cites testimony of the VE as basis for his argument that no light jobs are available where he would not have to use his hands to a pretty significant degree. [See Plaintiff's Brief, p. 5]. However, the modified response cited by Plaintiff for this

argument was the VE's response to a hypothetical question presented by the ALJ that included moderate to severe gripping and fingering limitations on both hands. [R. 88-90]. The ALJ ultimately found moderate limitations in Plaintiff's ability to use his left hand, the one upon which carpel tunnel release surgery had been performed, and only mild limitations in Plaintiff's ability to use his dominant right hand. [R. 22]. The VE identified several unskilled light jobs which Plaintiff could perform with these limitations. [R.86-87]. The "counter sales" job, which Plaintiff protests he could not perform because of a mental impairment, is likewise not eliminated as the ALJ found Plaintiff's mental condition no more than minimally affected his ability to work. [R. 19].

In posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. The Court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

Conclusion

The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 6th day of Dec., 1999.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE PALMER,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 99-CV-372-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 2nd day of Dec, 1999.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

original

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

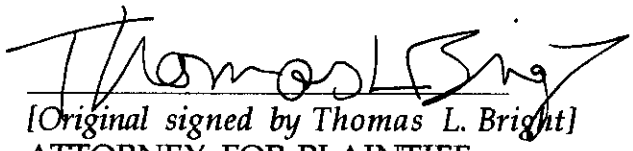
SHARON MARIE DOYLE, individuals, plaintiff	)	
	)	Case No. 98-C-791-H
v.	)	
	)	
KMART CORPORATION,	)	
&	)	
its affiliate,	)	
KMART STORE # 7250, &	)	**STIPULATION TO DISMISS**
DWIGHT ELLIOTT,	)	**WITH PREJUDICE.**
co-defendants.	)	

STIPULATION TO DISMISS WITH PREJUDICE.

Plaintiff, **SHARON MARIE DOYLE,** and all defendants, **KMART CORPORATION, KMART STORE # 7250,** and **DWIGHT ELLIOTT,** hereby stipulate under Federal Rule of Civil Procedure 41 to dismissal of this action with prejudice. Each party has agreed to bear its or her own costs and attorney fees and to not attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state or federal cost or fee shifting laws.

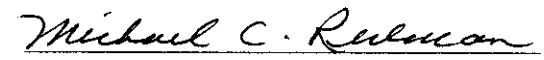
Respectfully submitted,

ATTORNEY FOR SHARON MARIE DOYLE:



[Original signed by Thomas L. Bright]
ATTORNEY FOR PLAINTIFF
406 South Boulder, Suite 411
Tulsa, OK 74103
(918-582-2233; fax 582-6106).
OBA# 001131.

ATTORNEYS FOR ALL DEFENDANTS:



LYNN PAUL MATTSON
MICHAEL C. REDMAN
c/o Doerner, Saunders
320 South Boston, Suite 500
Tulsa, OK 74103
(918-582-1211; fax 591-5360).

MT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. LARRY LA WAYNE LUCAS aka Larry L. Lucas; JOYCE A. COOPER fka Joyce A. Lucas; SPOUSE OF JOYCE A. COOPER; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	FILED DEC 6 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT ENTERED ON DOCKET DATE DEC 07 1999 CIVIL ACTION NO. 99-CV-0687-K (J)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On November 12, 1999, the United States of America recovered judgment in rem against the Defendant, Larry La Wayne Lucas aka Larry L. Lucas, in the above-styled action to enforce a mortgage lien upon the following described property:

> Lot Eleven (11), Block Nineteen (19), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The amount of the judgment is the sum of $3,214.09, plus administrative charges in the amount of $183.80, plus penalty charges in the amount of $8.80, plus accrued interest in the amount of $1,507.84 as of October 2, 1998, plus interest accruing thereafter at the rate of 4.5 percent per

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annum until judgment, plus interest thereafter at the current legal rate of 5.411 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If the Defendant, Larry La Wayne Lucas aka Larry L. Lucas, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 6th day of December, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By M. Tarwater
Deputy

Order of Sale
Case No. 99-CV-0687-K (J) (Lucas)
PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA HAYS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 99 CV 0337 H (J)**
	)	
MICHAEL BEARD and,	)	ENTERED ON DOCKET
CHRISTOPHER CRAWLEY,	)	
	)	DATE DEC 07 1999
Defendants.	)	

STIPLUATION OF DISMISSAL WITH PREJUDICE

COME NOW the above-named Parties, by and through their attorneys of record and hereby stipulate to the dismissal with prejudice of the Plaintiff's action against the Defendants.

Respectfully Submitted,

McCune & Penney,

Mitchell M. McCune, OBA 15392
Ryan J. Assink, OBA 17568
406 S. Boulder, Suite 400
Tulsa, Oklahoma 74103
(918) 583-1441 telephone
(918) 584-9988 facsimile
ATTORNEY FOR PLAINTIFF

and

Daniel, Baker & Howard,

Thomas E. Baker, OBA 11504
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105
(918) 749-5988 telephone
ATTORNEY FOR DEFENDANTS

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WANDA SUE REECE, in her individual capacity,	)	
Plaintiff,	)	
vs.	)	**CASE NO: 99-CV-631-K (J)**
WAL-MART STORES, INCORPORATED, a Delaware Corporation, in their Corporate capacity; and SHANNON GREEN, in his individual and professional capacity,	)	
Defendants.	)	

JOINT DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, WANDA SUE REECE, by and through her Attorney of Record, John M. Butler, and the Defendant, Wal-Mart Stores, Inc., and Shannon Green, by and through their Attorney of Record, Mark Steele, and hereby agree to jointly dismiss the above-captioned case with prejudice with each party bearing their own costs and expenses.

Respectfully submitted,

John M. Butler, OBA #1377
6846 South Canton, Suite 150
Tulsa, Oklahoma 74136
(918) 494-9595
(918) 494-5046 Facsimile
Counsel for Plaintiff, Wanda Sue Reece

Mark T. Steele, OBA #14078
1437 South Boulder, Suite 820
Tulsa, Oklahoma 74119-3610
(918) 382-7523
Counsel for Defendants, Wal-Mart Stores, Inc., and Shannon Green

CERTIFICATE OF MAILING

I hereby verify that a true and correct copy of the foregoing Joint Dismissal with Prejudice was mailed, postage prepaid, on this ____ day of November, 1999, to:

Mark T. Steele
Counsel for Defendants, Wal-Mart and Shannon Green
Latham, Stall, Wagner, Steele & Lehman, P.C.
1437 South Boulder, Suite 820
Tulsa, Oklahoma 74119-3610

Wanda Sue Reece
P.O. Box 162
Southwest City, MO 64863

John M. Butler, OBA #1377
Counsel for Plaintiff, Wanda Sue Reece

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

JOHN L. SWYDEN aka John Swyden
aka John Lee Swyden, a single person;
STATE OF OKLAHOMA ex rel.
Oklahoma Employment Security Commission;
MID-CONTINENT MEDICAL CORP.
dba Merkel X-Ray Co.;
W. L. SHARP dba Sharp Heat & Air;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma,
SOUTHWESTERN BELL YELLOW PAGES;
JANA V. SWYDEN aka Jana Swyden;

Defendants.

CIVIL ACTION NO. 99-CV-0191-B (E)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2nd day of December, 1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, appears by its attorney David T. Hopper; that the Defendant, Southwestern Bell Yellow Pages, appears not, having previously filed its Disclaimer; that the Defendants, John L.

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Swyden aka John Swyden aka John Lee Swyden, a single person; Mid-Continent Medical Corp. dba Merkel X-Ray Co.; W. L. Sharp dba Sharp Heat & Air; and Jana Swyden aka Jana V. Swyden, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, John L. Swyden aka John Swyden aka John Lee Swyden, a single person, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 17, 1999; that the Defendant, Mid-Continent Medical Corp. dba Merkel X-Ray Co., executed a Waiver of Service of Summons on March 19, 1999 by its president; that the Defendant, W. L. Sharp dba Sharp Heat & Air, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee on July 21, 1999; that the Defendant, Southwestern Bell Yellow Pages, executed a Waiver of Service of Summons by its attorney Richard D. White, Jr. on September 14, 1999; that the Defendant, Jana Swyden aka Jana V. Swyden, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee on July 17, 1999.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on or about September 17, 1999; that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, filed its Answer on March 26, 1999; that the Defendant, Southwestern Bell Yellow Pages, filed its Disclaimer on September 29, 1999; and that the Defendants, John L. Swyden aka John Swyden aka John Lee Swyden, a single person; Mid-Continent Medical Corp. dba Merkel X-

Ray Co.; W. L. Sharp dba Sharp Heat & Air; and Jana Swyden aka Jana V. Swyden, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 29, 1997, John Lee Swyden filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 97-02454-R. On August 11, 1997, the United States Bankruptcy Court for the Northern District of Oklahoma entered its Order Dismissing Case, and Final Decree was entered on December 2, 1997.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> LOT 50 IN BLOCK 2 OF EASTWOOD LAKE ESTATES II AMENDED, A SUBDIVISION IN SECTION 24, TOWNSHIP 21 NORTH, RANGE 14 EAST OF THE I. B. & M., ROGERS COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on September 24, 1993, John L. Swyden and Jana V. Swyden executed and delivered to Bank United of Texas FSB, their mortgage note in the amount of $106,500.00, payable in monthly installments, with interest thereon at the variable rate of 5 percent per annum.

The Court further finds that as security for the payment of the above-described note, John L. Swyden and Jana V. Swyden, husband and wife, executed and delivered to Bank United of Texas FSB, a real estate mortgage dated September 24, 1993, covering the above-described property, situated in the State of

Oklahoma, Rogers County. This mortgage was recorded on October 7, 1993, in Book 931, Page 510, in the records of Rogers County, Oklahoma.

The Court further finds that the United States of America on behalf of the Secretary of Veterans Affairs is the current owner of the above-described note and mortgage through mesne conveyances. The Secretary of Veterans Affairs refunded this loan and the interest rate became 4 percent per annum.

The Court further finds that John L. Swyden and Jana V. Swyden were divorced on October 13, 1994, as is evidenced by a Decree of Divorce, Case No. FD-94-211, District Court, Rogers County, Oklahoma. This Decree was recorded on March 10, 1997, in Book 1057, Page 41 and also on March 5, 1999, in Book 1159, Page 0425, in the records on Rogers County, State of Oklahoma. The subject real property was awarded to John L. Swyden who is therefore now the current owner of the property.

The Court further finds that the Defendant, John L. Swyden aka John Swyden aka John Lee Swyden, a single person, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $110,022.80, plus administrative charges in the amount of $910.00, plus penalty charges in the amount of $150.00, plus accrued interest in the amount of $1,879.13 as of November 5, 1996, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter

at the legal rate until fully paid, and the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, has a lien on the property which is the subject matter of this action in the amount of $1,308.92 plus interest and costs as of March 26, 1999, by virtue of an unemployment compensation tax warrant, dated September 18, 1995, and recorded on July 23, 1996, in Book 1032, Page 0827 in the records of Rogers County, Oklahoma.

The Court further finds that the Defendant, Southwestern Bell Yellow Pages, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, County Treasurer, Rogers County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $393.29, plus penalties and interest, for the year 1998. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Rogers County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, John L. Swyden aka John Swyden aka John Lee Swyden, a single person; Mid-Continent Medical Corp. dba Merkel X-Ray Co.; W. L. Sharp dba Sharp Heat & Air; and Jana Swyden aka Jana V. Swyden, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated March 27, 1995, and recorded on April 4, 1995, in Book 985, Page 694 in the records of Rogers County, Oklahoma; and by virtue of a Notice of Federal Tax Lien dated August 15, 1995, and recorded on September 5, 1995, in Book 1000, Page 834 in the records of Rogers County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the liens will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Veterans Affairs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendant, John L. Swyden aka John Swyden aka John Lee Swyden, a single person, in the principal sum of $110,022.80, plus administrative charges in the amount of $910.00, plus penalty charges in the amount of $150.00, plus accrued interest in the amount of $1,879.13 as of November 5, 1996, plus interest accruing thereafter at the rate of 4 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.471 percent per annum until fully paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission, have and recover judgment in the amount of $1,308.92 plus interest and costs as of March 26, 1999, by virtue of an unemployment compensation tax warrant, dated September 18, 1995, and recorded on July 23, 1996, in Book 1032, Page 0827 in the records of Rogers County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Rogers County, Oklahoma, have and recover judgment in the amount of $393.29, plus penalties and interest, for 1998 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, John L. Swyden aka John Swyden aka John Lee Swyden, a single person; Mid-Continent Medical Corp. dba Merkel X-Ray Co.; W. L. Sharp dba Sharp Heat & Air; Southwestern Bell Yellow Pages; Jana Swyden aka Jana V. Swyden; and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

> First:
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Rogers County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:
In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

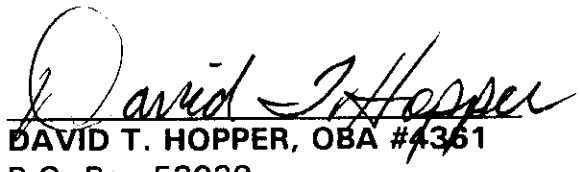
STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 South Missouri, Room 1-111
Claremore, Oklahoma 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Case No. 99-CV-0191-B (E) (Swyden)

PB:css



DAVID T. HOPPER, OBA #4361
P.O. Box 53039
Oklahoma City, Oklahoma 73152-3039
(405) 557-7146
Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Employment Security Commission

Judgment of Foreclosure
Case No. 99-CV-0191-B (E) (Swyden)

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD MARCANTEL, an individual, and DEBRA MARCANTEL, an individual,

Plaintiffs,

vs.

FORD MOTOR COMPANY, AUTOZONE, INC., CHAMPION LABORATORIES, INC., AND FUEL FILTER TECHNOLOGIES, INC.,

Defendants.

Case No. 98-CV-527-H (E)

ORDER OF DISMISSAL WITH PREJUDICE

Before the Court is the parties' Stipulation for Dismissal with Prejudice and it is hereby

ORDERED that plaintiffs' actions against Ford Motor Company are dismissed, with prejudice, each party to bear their own costs.

DATE: December 3, 1999

JUDGE
UNITED STATES DISTRICT COURT

698305.1

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK McCARTER,

Petitioner,

vs.

RON CHAMPION, Warden,

Respondent.

Case No. 97-CV-806-C (M)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, a prisoner in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CF-93-5125. Respondent has filed a Rule 5 response (#5). Petitioner has filed a reply (#6). For the reasons discussed below, the Court finds that this petition should be denied.

BACKGROUND

On November 4, 1993, two (2) year old Isaiah Dean McCarter was found dead on the floor next to his crib. The Medical Examiner determined that the death was a homicide and that the cause of death was a ruptured stomach. Petitioner Jack McCarter, the victim's father,[1] was tried by a jury and convicted of First Degree Murder under Okla. Stat. tit. 21, § 701.7(C).[2] At trial, Petitioner was

[1]Although Petitioner signed an affidavit stating that he was Isaiah's father, Petitioner expressed doubts to Isaiah's mother, Judith Mitchell, that Isaiah was his son. (Trans. at 375.)

[2]According to the opinion of the Oklahoma Court of Criminal Appeals (#1, Ex. A), Petitioner and the victim's mother, Judith Mitchell, were charged conjointly with first degree murder and two counts of child abuse. At the preliminary hearing, the trial court sustained defense demurrers to the child abuse counts and those counts were subsequently dismissed in amended informations. Initially, Petitioner and Mitchell were tried together on murder charges, but the jury failed to find unanimously either defendant guilty as charged. Thereafter, the cases

represented by attorney Pete Silva. The trial court followed the jury's recommendation and sentenced Petitioner to life imprisonment without the possibility of parole.

Petitioner, represented by an attorney from the Office of the Appellate Indigent Defender, perfected a direct appeal where he raised the following six (6) propositions of error:

I. Mr. McCarter's convictions must be reversed because the trial court erroneously allowed the irrelevant and prejudicial testimony of alleged other crimes.

II. Mr. McCarter was denied a fair trial when the prosecutor was allowed to elicit testimony from Mitchell that she feared Mr. McCarter.

III. There was insufficient evidence to convict Mr. McCarter of Murder in the First Degree.

IV. The trial court's failure to grant a mistrial was an abuse of discretion; an evidentiary harpoon denied Mr. McCarter a fair trial.

V. Prosecutorial misconduct deprived Mr. McCarter of a fair trial.

VI. Mr. McCarter's sentence was excessive.

(#5, Ex. A.) Petitioner also submitted a *pro se* brief on appeal, raising as a seventh proposition of error that "the jury was not properly instructed as to the elements of the offense; therefore, appellant's conviction must be reversed and remanded for a new trial." (#5, Ex. B). On March 26, 1997, in an unpublished opinion, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's conviction and sentence. (#1, Ex. A.) Petitioner, through his attorney of record, filed a petition for rehearing on the basis that the OCCA had inadvertently considered the wrong jury instruction in evaluating the merits of Petitioner's seventh proposition of error (#5, Ex. C.) On July 2, 1997, after

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were severed with Petitioner proceeding to trial first. That trial resulted in a mistrial prior to impaneling of the jury. The conviction challenged in the instant habeas corpus petition was obtained as a result of Petitioner's third trial. After testifying for the State in Petitioner's third trial, Mitchell pled guilty to accessory after the fact to first degree murder and was sentenced to ten (10) years imprisonment and a five hundred dollar ($500.00) fine.

reviewing and rejecting Petitioner's seventh proposition of error in light of the challenged jury instruction, the OCCA denied the request for rehearing. (#1, Ex. B.)

Petitioner filed the instant petition on September 3, 1997. Petitioner requests habeas corpus relief based on the seven (7) claims raised on direct appeal before the OCCA, asserted in the same numerical order. In support of his claims, Petitioner references his briefs filed on direct appeal before the OCCA. In response to the petition, Respondent argues as an initial matter that Petitioner has failed to satisfy the standard of review imposed by 28 U.S.C. § 2254(d). Respondent further asserts that claims numbered one, two, four and seven address issues of state law and are not cognizable in a federal habeas corpus proceeding; and that claims three, five and six, challenging the sufficiency of the evidence, alleging prosecutorial misconduct, and alleging that the sentence was excessive, are without merit. In reply to the response, Petitioner argues that the OCCA's rejection of his claims conflicts with the constitutional authorities cited in his briefs filed on direct appeal and in support of the petition for hearing before the OCCA (#6).

ANALYSIS

A. Exhaustion and Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). Respondent concedes and the Court finds Petitioner has presented each of his claims to the OCCA on direct appeal and meets the exhaustion requirement of § 2254(b). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

In addition, the Court finds Petitioner is not entitled to an evidentiary hearing on his claims. Nothing in the record indicates that Petitioner was denied an evidentiary hearing in state court. As

a result, this Court cannot hold an evidentiary hearing unless Petitioner satisfies the showing prescribed by 28 U.S.C. § 2254(e)(2).[3] After reviewing Petitioner's claims and the relevant record, the Court finds Petitioner has failed to make the necessary showing and is not entitled to an evidentiary hearing under § 2254(e)(2).

B. Standard of review under the AEDPA

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the OCCA unless the adjudication of the claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). As discussed above, Petitioner raised each of his claims on direct appeal. The state appellate court considered the merits of each claim, either in the order affirming Petitioner's conviction and sentence or in the order denying rehearing. (#1, Exs. A and B). Therefore, unless

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[3] 28 U.S.C. § 2254(e)(2) provides as follows:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

the Court of Criminal Appeals's adjudication of the claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," this Court must deny the requested habeas relief as to those claims. 28 U.S.C. § 2254(d).

C. Petitioner is not entitled to habeas corpus relief

1. Evidentiary rulings by trial court (claims I, II and IV)

In his first, second and fourth propositions of error, Petitioner alleges that the trial court erred in admitting certain evidence during his trial. As his first proposition of error on direct appeal, Petitioner alleged that the trial court erred in allowing the victim's mother, Judith Mitchell, and the victim's eleven-year old half-brother, Chebon, to testify that they had observed Petitioner bite the victim's fingers. Chebon also testified that he saw Petitioner use his leg to push the victim. Also, Petitioner claimed that the trial court erred in allowing the Medical Examiner, Dr. Distefano, to testify as to the existence of a spiral fracture of the victim's tibia, an injury that predated the fatal stomach injury. On direct appeal, Petitioner argued that this evidence was irrelevant, unreliable, inflammatory, and highly prejudicial. (#5, Ex. A at 2.) As his second proposition of error, Petitioner asserted he was denied a fair trial when the trial court allowed the victim's mother, Mitchell, to testify that she feared Petitioner. Similarly, Petitioner argued as his fourth proposition of error that he was denied a fair trial as a result of the injection of an "evidentiary harpoon" by one of the State's witnesses and that the trial court erred in failing to grant a mistrial.

As an initial matter, Petitioner has failed to assert a basis for finding that the OCCA's

rejection of these claims on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, "[i]n a habeas proceeding claiming a denial of due process, 'we will not question the evidentiary ... rulings of the state court unless [the petitioner] can show that, because of the court's actions, his trial, as a whole, was rendered fundamentally unfair.' " Maes v. Thomas, 46 F.3d 979, 987 (10th Cir.1995) (quoting Tapia v. Tansy, 926 F.2d 1554, 1557 (10th Cir.1991)); see also Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir.1979). "[W]e approach the fundamental fairness analysis with 'considerable self-restraint.' " Jackson v. Shanks, 143 F.3d 1313, 1322 (10th Cir.) (quoting United States v. Rivera, 900 F.2d 1462, 1477 (10th Cir.1990) (*en banc*)), *cert. denied*, 119 S.Ct. 378 (1998). A proceeding is fundamentally unfair under the Due Process Clause only if it is " 'shocking to the universal sense of justice.' " United States v. Tome, 3 F.3d 342, 353 (10th Cir.1993) (quoting United States v. Russell, 411 U.S. 423, 432 (1973) (internal quotation omitted)), *rev'd on other grounds*, Tome v. United States, 513 U.S. 150 (1995).

After reviewing the record in the instant case, the Court finds Petitioner has failed to demonstrate that his trial was rendered fundamentally unfair as a result of the admission of the identified testimony. The testimony of Mitchell and Chebon concerning Petitioner's prior treatment of the victim was properly admitted as evidence of Petitioner's attitude and feeling of malice toward the victim. See Estelle v. McGuire, 502 U.S. 62, 69-70 (1991) (holding that evidence of prior injuries was probative on the question of the intent with which the person who caused the injuries acted and its admission did not render trial fundamentally unfair); Revilla v. State, 877 P.2d 1143, 1152 (Okla. Crim. App. 1994) (holding that under Oklahoma law, evidence of prior abusive conduct toward a child homicide victim, although evidence of other crimes, was properly admitted as relevant to show defendant's attitude and feeling of malice toward the victim). This exception to the general

prohibition against admission of other crimes evidence is also recognized under federal law. See Fed. R. Evid. 404(b). For the same reason, the Court also finds that the admission of the Medical Examiner's testimony concerning the existence of a healing fracture of the victim's tibia did not render Petitioner's trial fundamentally unfair. Thus, the admission of the challenged testimony did not constitute constitutional error justifying habeas corpus relief.

Similarly, the admission of Mitchell's testimony that she feared Petitioner, elicited by the State on re-direct, did not result in a fundamentally unfair trial violative of Petitioner's due process rights. The OCCA found that the trial court properly admitted the testimony since defense counsel prompted the line of questioning by asking Mitchell on cross-examination why she had initially lied concerning whether or not Petitioner spent the night at the family home the night before the victim's death. The Court finds that the OCCA's adjudication of this issue is supported by the record and that admission of the testimony did not render Petitioner's trial fundamentally unfair. Habeas corpus relief must be denied on this claim.

Petitioner further argues the trial court erred in failing to grant a mistrial after State's witness, police detective Olson, hurled "evidentiary harpoons" during his testimony. See United States v. Hooks, 780 F.2d 1526, 1535 n. 3 (10th Cir. 1986) (citing Bruner v. State, 612 P.2d 1375, 1378 (Okl.Crim.1980), and defining "evidentiary harpoon" as a "metaphorical term of art that has been used by several state courts to describe the situation where a government witness, while testifying in a criminal case, deliberately offers inadmissible testimony with the purpose of prejudicing the defendant"). On direct examination, Detective Olson was asked by the prosecutor whether he had previously visited the McCarter family residence. Detective Olson responded, "Yes, sir, briefly, to take the children into protective custody." (Trans. at 512). Petitioner contends Detective Olson

made this statement deliberately, for the purpose of offering inadmissible, prejudicial evidence against him. However, nothing in the record supports Petitioner's contention that the witness made the statement deliberately. Furthermore, another witness testified later in the trial, during cross-examination by defense counsel, that the Department of Human Services had intervened in the past. (Trans. at 590). Based on the record, the Court concludes that the admission did not result in a trial so fundamentally unfair as to deny Petitioner due process. See Hopkinson v. Shillinger, 866 F.2d 1185, 1197 (10th Cir. 1989).

2. Challenge to jury instruction (claim VII)

As his seventh proposition of error, Petitioner argues that the trial court failed to instruct the jury properly on the elements of the crime. As discussed above, Petitioner raised this claim as his seventh proposition of error on direct appeal by filing a *pro se* brief. (#5, Ex. B). The OCCA considered and rejected this claim on the merits in denying Petitioner's request for rehearing. (#1, Ex. B). Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, a habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990)). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "'[h]abeas proceedings may not be used

to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979)).

In this case, Petitioner argued in his *pro se* brief on direct appeal and in his petition for rehearing that the jury was not instructed on the element of intent required for a first degree murder conviction. The challenged instruction, as quoted by the OCCA in its order denying rehearing, provided as follows:

> No person may be convicted of Murder in the First Degree unless the State has proven beyond a reasonable doubt each element of the crime. These elements are:
> 1. Death of a child under the age of eighteen (18) years;
> 2. Death resulting from the injuring, torturing, maiming, or using of unreasonable force;
> 3. By a defendant;
> 4. Upon said child.

(#1, Ex. B at 2 (citing O.R. 239). After reviewing the record, the OCCA determined that no instruction on the intent element was given and that to omit such an instruction was error. However, after applying the harmless error analysis enunciated in Chapman v. California, 386 U.S. 18 (1967), as endorsed by the Supreme Court in California v. Roy, 519 U.S. 2, 6 (1996), the OCCA found that:

> the failure to instruct the jury on the intent element was harmless beyond a reasonable doubt as there is no indication in the record the jury was mislead by the instructions. Further, the evidence showed the victim's death was the result of Appellant's willful actions and the issues of accident or mistake were not raised by that evidence. Therefore, although the intent element should be set forth in the jury instructions, the failure to do so in this case is harmless beyond a reasonable doubt and did not render the trial unfair or the verdict unreliable or suspect. See Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993).

(#1, Ex. B at 3-4).

In reviewing a state court determination in a habeas corpus proceeding, this Court applies the "harmless error" standard enunciated in Kotteakos v. United States, 328 U.S. 750 (1946). Roy, 519 U.S. at 4. Under this standard, an error is harmless unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619 (1993) (quoting Kotteakos, 328 U.S. at 776). The Supreme Court has also stated that, in applying this standard in a habeas proceeding, if a reviewing court "is in grave doubt as to the harmlessness of an error," the habeas "petitioner must win." O'Neal v. McAninch, 513 U.S. 432, 437 (1995). The Court also finds Justice Scalia's concurring opinion in Roy provides guidance in evaluating whether the trial court's failure to include the element of intent constituted "harmless error." As Justice Scalia explained, "[t]he error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." Roy, 519 U.S. at 7.

In the instant case, the jury found that Isaiah McCarter, a child under the age of eighteen years was dead, and that the death resulted from injury caused by Petitioner. The only defense asserted by Petitioner was that someone else, i.e., Judith Mitchell, Chebon, or Mitchell's brother, had caused the death. The defense never asserted, nor does the evidence produced at trial support, that the child's death was the result of an accident or mistake. In the absence of any evidence even suggesting that the victim's fatal injury was sustained accidentally, the Court finds that it would have been impossible for the jury to have reached its verdict without finding that Petitioner's actions were "willful or malicious," i.e., that his actions were intentional. Thus, the Court concludes that although the trial court erred in failing to instruct on the element of intent, the error was harmless in that it had

no "substantial and injurious effect or influence" on the jury's verdict. Kotteakos, 328 U.S. at 776. Habeas relief on this claim is denied.

3. Challenge to sufficiency of the evidence (claim III)

As his third proposition of error, Petitioner argues that the evidence was insufficient to support his conviction for First Degree Murder. As an initial matter, Petitioner has failed to assert a basis for finding that the OCCA's rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d). Furthermore, sufficiency of the evidence claims are evaluated based on the following standard established by the Supreme Court:

> . . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citations omitted). In evaluating the evidence presented at trial, the Court does not weigh conflicting evidence or consider witness credibility. Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir. 1997); Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996). Instead, the Court must view the evidence in the "light most favorable to the prosecution," Jackson, 443 U.S. at 319, and "accept the jury's resolution of the evidence as long as

it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993).

In the instant case, the jury heard testimony and viewed evidence concerning Petitioner's relationship with the victim, Petitioner's contact with the victim during the days and hours preceding his death, and the nature of the injury causing the victim's death. The Court concludes that this evidence, when viewed in a light most favorable to the State, was sufficient to allow the jury as a rational trier of fact to have found the essential elements of First Degree Murder beyond a reasonable doubt. Petitioner has failed to demonstrate that the OCCA's resolution of this claim was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. As a result, the Court finds habeas corpus relief should be denied on this claim.

4. Prosecutorial misconduct (claim V)

As his fifth proposition of error, Petitioner alleges that his trial was fundamentally unfair due to prosecutorial misconduct. Prosecutorial misconduct does not warrant federal habeas relief unless the conduct complained of "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); see also Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir.1990). In evaluating whether improper prosecutorial comments render a trial fundamentally unfair, the comments must be viewed within the context of the trial as a whole. United States v. Young, 470 U.S. 1, 11-12 (1985). Petitioner asserts that during his closing argument, the prosecutor expressed personal opinions, misstated the evidence, called Petitioner a liar, and attempted to obtain the sympathy of the jury. Defense counsel objected to each of the instances of alleged misconduct.

After reviewing the State's closing argument within the context of the trial as a whole, the

Court finds that the allegedly improper prosecutorial comments did not render Petitioner's trial fundamentally unfair. Those remarks characterized by Petitioner as statements of personal opinion (Trans. at 634, 636-38) were comments on the evidence well within the range of latitude allowed during closing argument. See United States v. Manriquez Arbizo, 833 F.2d 244, 247 (10th Cir.1987) (stating that "[t]he prosecutor is allowed a reasonable amount of latitude in drawing inferences from the evidence during closing summation"). After defense counsel objected to the prosecutor's characterization of the evidence (Trans. at 670, 672), the trial court cured any error by instructing the jury that the attorneys' arguments were not to be considered evidence in the matter. The trial court also sustained defense counsel's objection to the prosecutor's characterization of Petitioner's statement to Detective Olson as a lie. (Trans. at 668.) Finally, the prosecutor's description of the victim's death as a "slow painful agonizing death" (Trans. at 672-73) was not a misstatement of the evidence designed to gain juror sympathy but a reasonable comment on the Medical Examiner's testimony. After reviewing the prosecutor's closing argument, the Court finds that none of the allegedly improper remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly, 416 U.S. at 643. As there is no basis for issuance of the writ under 28 U.S.C. § 2254(d), habeas corpus relief on this claim is denied.

5. Petitioner's sentence is not excessive (claim VI)

As the sixth proposition of error, Petitioner argues that his sentence should be modified because the sentence of life without possibility of parole "should clearly shock the conscience of the court." (#1 at 12.) In affirming Petitioner's conviction and sentence, the OCCA rejected this claim. As with each of his other claims, Petitioner has failed to assert a basis for finding that the OCCA's

rejection of this claim on direct appeal warrants issuance of the writ under 28 U.S.C. § 2254(d).

The length of sentences imposed for crimes classified as felonies is properly determined by legislatures. Hutto v. Davis, 454 U.S. 370, 374 (1982). Federal courts should rarely review legislatively mandated terms of imprisonment. Id. at 374. The sentence received by Petitioner in this case was one of the three options mandated by Oklahoma law. See Okla. Stat. tit. 21, § 701.9(A) (providing that "[a] person who is convicted of . . . murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life"). Because Petitioner's sentence comports with the mandate of the Oklahoma Legislature, the Court finds his sentence was not excessive. Habeas corpus relief on this claim is denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

SO ORDERED THIS 3 day of December, 1999.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIRST MARINE INSURANCE COMPANY,

Plaintiff,

vs.

JIM D. SCOTT and BRENDA SCOTT, and CITY BANK TRUST COMPANY OF OKLAHOMA CITY, OKLAHOMA, now Bancfirst,

Defendants, 3rd Party Plaintiffs,

vs.

STEVE YOUNG,

3rd Party Defendant.

Case No. 97-C-113-E

ORDER

Now before the Court is the Second Motion For Recovery of Attorney's Fees (Docket #44) of the Plaintiff First Marine Insurance Company(First Marine), the Third Motion for Recovery of Attorney's Fees (Docket #82) of First Marine, and Application for Further Relief on Declaratory Judgment and Motion to Set Supersedeas Bond and Appellate Cost Bond (Docket #87) of First Marine.

First Marine brought this action for a declaratory judgment regarding a policy of boat insurance issued by First Marine to the Defendants, Jim Scott, Brenda Scott, and City Bank and Trust Company of Oklahoma City (the Scotts). The policy, with a limit of $85,000, was taken out by the Scotts in February, 1994 to insure a 1993 40' Sea Ray Cabin Cruiser. The boat had an approximate market value of $150,000, but Mr. Scott chose to insure the boat for only $85,000,

which is how much Mr. Scott owed Bancfirst on the boat at the time he took out the insurance. When the boat was damaged in a windstorm on Grand Lake, First Marine took the position that it could pay the Scotts the policy limits of $85,000.00 and then take the boat for salvage. The Scotts argued that First Marine was not entitled to the boat as salvage, that they were entitled to be paid for damages up to $85,000, and that the conduct of First Marine amounts to bad faith. First Marine prevailed on summary judgment and the parties agreed to an attorney's fee award of $10,500.00. Subsequently, the Scotts filed a Motion for Reconsideration, and the Motion was denied.

In the Second Motion for Attorney's Fees, First Marine seeks $4104.00 in attorney's fees, resulting from a total of 45.6 hours expended, at a rate of $90 per hour. Although the Scotts' were given additional time in which to respond to the second motion, they failed to do so. The Court finds that 45.6 hours spent on researching responding to a motion for clarification and reconsideration, drafting a motion for costs and attorney's fees, negotiating a settlement on the attorney fee issue, and communicating with counsel regarding a schedule is reasonable. Further, the Court finds that $90 per hour is consistent with hourly rates in the community for lawyers of comparable experience handling similar types of litigation. Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983). First Marine's Second Motion for Recovery of Attorney's Fees is granted in the amount of $4,104.00.

In First Marine's Third Motion for Recovery of Attorney's Fees, they request reimbursement for 73.5 hours of time at the rate of $90 per hour. The Scotts object to the request, arguing that Plaintiff is not entitled to Attorney's Fees for Monitoring, and that Plaintiff's fees are excessive to the extent that reimbursement is sought for two attorneys attending the deposition of Third Party Defendant, Steve Young. The Scotts, however, fail to specify which fees they believe are merely for monitoring as opposed to fees incurred which are directly related to First Marine's claims. A

review of the fee application of First Marine, in the context of the Scott's clearly stated intention of amending their Answer to formally assert a claim for reformation against First Marine leads the Court to the conclusion that First Marine is entitled to Attorney's Fees for the time at issue. The Court does, however, agree with the Scotts that First Marine is not entitled to fees for two attorneys attending a deposition. The requested fee is therefore reduced by $756.00 to $5,746.30.

Lastly, First Marine argues that it is entitled to a Supersedeas Bond to "secure the Eighty-Five Thousand Dollar ($85,000) value of the boat pending appeal." First Marine also asserts that the Supersedeas bond should cover "all attorney's fees and costs incurred to date[1]." The purpose of a Supersedeas Bond "is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency." Grubb v. FDIC, 833 F.2d 222, 226 (10th Cir. 1987). "Typically, the amount of the bond matched the full amount of the judgment." Olcott v. Delaware Flood Co., 76 F.3d 1538, 1559 (10th Cir. 1996). However, district courts have inherent discretionary authority in setting supersedeas bonds. Id., at p. 1560. In applying these rules, the Court finds no legal support for First Marine's argument that it is entitled to a bond to secure the $85,000 value of the boat. In fact, there has been absolutely no finding that the boat has an $85,000 value, or for that matter, any value in excess of $15,000.[2] The only thing that the Court has found is that, consistent with the policy language, First Marine is entitled to receive title to the boat upon paying the face amount of the policy, $85,000. The Court finds that First Marine would be fully protected during

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[1] As of this Order, First Marine has been awarded $20,463.40 in fees and expenses.

[2] In its Order dated January 13, 1999, the Court noted: "Based on the repair estimate of approximately $72,000, and the policy limit of $85,000, a salvage value in excess of merely $15,000 would cause the policy provision in question to be satisfied. . . . [T]here is no question but that the salvage value as the term is ordinarily used and defined, would exceed $15,000."

the pendency of the appeal so long as the boat is reasonably protected from further damage.

In this respect, the Scotts' note that the boat has been winterized, that the boat is in a secure location, and that the boat has been "shrink wrapped" three times, although it appears that the wrap has been removed at this point. The Court finds that First Marine's interest would be fully protected upon shrink wrapping of the boat. The Scotts are directed to have the boat shrink wrapped, and, if the shrink wrapping fails, have the shrink wrapping replaced. In lieu of posting a Supersedeas Bond in the amount of $85,000, the Scotts are to bear the financial burden of shrink wrapping the boat in the initial instance, and any subsequent time, unless the failure is due to inspection of the boat by First Marine, in which case, First Marine will be responsible for replacing the shrink wrapping. In addition, the Scotts are directed to secure a Supersedeas Bond in the amount of $20,463.40 for costs and attorney's fees. The Court does not see any need for posting an appellate cost bond.

First Marine's Second Motion for Recovery of Attorney's Fees (Docket # 44) is granted in the amount of $4,104.00. First Marine's Third Motion for Recovery of Attorney's Fees (Docket # 82) is granted in the amount of $5,746.30. First Marine's Application for Further Relief on Declaratory Judgment and Motion to Set Supersedeas Bond and Appellate Cost Bond (Docket #87) is granted in part and denied in part.

IT IS SO ORDERED THIS 3RD DAY OF DECEMBER, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK McCARTER,

Petitioner,

vs.

RON CHAMPION, Warden,

Respondent.

Case No. 97-CV-806-C (M)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 3 day of December, 1999.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff(s),

vs.

MEMORIAL PARK CEMETERY ASSO.,

Defendant(s).

Case No. 99-C-49-B

ORDER DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 3rd day of December, 1999.

THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV0710BU(M)
	)	
DANETTE E. BRADFORD,	)	
	)	
Defendant.	)	

AMENDED
DEFAULT JUDGMENT

This matter comes on for consideration this 2 day of Dec, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Danette E. Bradford, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Danette E. Bradford, was served with Summons and Complaint on October 12, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Danette E. Bradford, for the principal amount of $2,289.66 and 2,872.10,

plus accrued interest of $1,538.88 and 1,418.96, plus interest thereafter at the rate of 9.13 and 8% percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.47 percent per annum until paid, plus costs of this action.

s/ MICHAEL BURRAGE

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/jmo

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONSBANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	**No. 98-CV-62-K (J)** ✓
v.	)	
	)	
AMOS EUGENE TAYLOR, an individual; BARBARA LYNN TAYLOR, an individual; and AMOS EUGENE TAYLOR, as Trustee of the Amos Eugene Taylor Trust,	)	
	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

NOW on this 1st day of December, 1999, this case comes on for consideration before the Honorable Terry C. Kern, Chief, United States District Judge for the Northern District of Oklahoma. Plaintiff, NationsBank, N.A., appears by and through its attorney of record, Joel W. Harmon, and Defendants, Amos Eugene Taylor, Barbara Lynn Taylor, and Amos Eugene Taylor as Trustee of the Amos Eugene Taylor Trust, appear by and through their attorney of record, Bill V. Wilkinson. This Journal Entry is entered pursuant to this Court's Judgment of November 13, 1998 and Order of the same date, wherein the Court granted summary judgment in favor of Plaintiff and against Defendants on Plaintiff's Motion for Summary Judgment, as to Plaintiff's claims as well as Defendants' Counterclaims. In the Court's Order of February 5, 1999, the Court denied Defendants'

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Motion for a New Trial or to Alter or Amend the Judgment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment *in personam* is entered in favor of Plaintiff on Plaintiff's First Cause of Action against Defendants Amos Eugene Taylor and Barbara Lynn Taylor in the principal amount of $ 150,498.00, together with interest through February 5, 1999, in the amount of $ 47,256.02, and with further interest thereafter at the rate of 10.5% per annum until fully paid, together with costs and a reasonable attorney fee.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment *in rem* is entered in favor of Plaintiff on Plaintiff's Second Cause of Action against Defendants declaring the Mortgage to be a valid, prior, and superior lien in the Property described as:

> The North 410 feet of the West 240 feet of the NW/4 of the NE/4 of Section 34, Township 18 North, Range 13 East of the Indian Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government Survey thereof,

(the "Property") in the principal amount of $ 150,498.00, together with interest through February 5, 1999 in the amount of $ 47,256.02, and with further interest thereafter at the rate of 10.5% per annum until paid, together with costs and a reasonable attorney fee, subject only to unpaid ad valorem real estate taxes and assessments; and the Mortgage described above is hereby foreclosed and the Property described above shall be executed upon and sold, with appraisement, subject only to unpaid taxes and assessments, if any, to satisfy this Judgment, and the proceeds of the sale shall be applied first to the satisfaction of this Judgment, then to Plaintiff's costs, then to Plaintiffs' attorney fees, with the surplus, if any, to be paid into

Court to abide its further order; and any interest which the Defendants or any of them, or any person claiming by, under, or through any of them, in and to the Property is declared to be subject, junior, and inferior to the lien of Plaintiff's Mortgage, and upon confirmation of the sale of the Property, all Defendants, and all persons or entities claiming by, through, or under them, or any of them, shall be forever barred, foreclosed, and enjoined from asserting or claiming any right, title, interest, estate, or equity of redemption in or to said Property, or any part thereof.

ORDERED THIS 1st DAY OF DECEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

DONNIE E. HENDERSON,

Debtor,

THE STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION,

Appellant,

vs.

DONNIE E. HENDERSON,

Appellee.

Case No. 99-CV-518-H (M)

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. Appellant, The State of Oklahoma, ex rel, Oklahoma Tax Commission (OTC), appeals from a decision of the Bankruptcy Court holding that taxes assessed by the OTC for tax year 1990 were not excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i).

I. JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White* (*In re White*), 25 F.3d 931, 933 (10th Cir. 1994). This case, presented on stipulated facts, involves only a question of law.

II. STIPULATED FACTS

The parties stipulated to the material facts. On April 15, 1991, Debtor filed an Oklahoma income tax return for tax year 1990. On or about May 20, 1994, additional Oklahoma income tax was assessed by the OTC against Debtor as a result of the receipt by the OTC of an IRS Revenue Agent Report showing that additional federal income tax was assessed against Debtor for tax year 1990. The date of the final determination by the IRS of the corrected amount of Debtor's 1990 taxable income was July 20, 1993. Debtor has never filed an amended Oklahoma income tax return reporting the additional income tax assessed as a result of the additional federal assessments for tax year 1990; nor has Debtor notified the OTC by letter of the IRS determination. The additional tax assessed by the OTC against Debtor, together with interest and penalties amounts to $10,267.62.

III. DISCUSSION

Section 523(a)(1) of the Bankruptcy Code states in part:

> A discharge under section 727 ... of this title does not discharge an individual debtor from any debt –
> (1) for a tax -
> * * *
> (B) with respect to which a return, if required –
> (i) was not filed; . . .

At the time relevant to this case, 68 O.S. § 2375(H)(2) provided that if the amount of a taxpayer's net income tax for any year is changed or corrected by the IRS, such taxpayer, within one year after final determination of the corrected net income, "shall

file an amended return reporting the corrected net income, or notify the tax commission by letter that the information is available."

The determinative issue on this appeal is whether the debtor's failure to notify the OTC of the IRS action regarding the 1990 tax return by either filing an amended return or by letter, is a failure to file a "required return" under § 523(a)(1). The Bankruptcy Court found that it was not. The OTC argues that the debtor's failure to notify the OTC of the IRS action is the equivalent of failing to file a "required return." The OTC states: "The notification requirement under § 2375 qualifies as an amended return." [Appellant's Opening Brief, p. 17].

Courts deciding this issue, including the Bankruptcy Judges of this district, have reached opposite conclusions. Some courts hold that only a failure to file a required return excepts the debt from discharge. *In re Jackson*, 184 F.3d 1046, 1052 (9th Cir. 1999); *In re Jerruld*, 208 B.R. 183 (BAP 9th Cir. 1997); *In re Dyer*, 158 B.R. 904 (Bankr. W.D. N.Y. 1993); *In re Blackwell*, 115 B.R. 86 (Bankr. W.D. Va. 1990). Other courts hold that the failure to give any required notice excepts the debt from discharge. *In re Herring,* No. 96-01317-M (Bankr. N.D. Okla. May 21, 1999); *In re Blutter*, 177 B.R. 209, 211-212 (Bankr. S.D. N.Y. 1995); *In re Lamborn*, 181 B.R. 98 (Bankr. N.D. Okla. 1995).

After considering the briefs filed by the parties and the analysis provided by the courts addressing the issue, the undersigned is persuaded that this case was correctly decided by the Bankruptcy Court. While the OTC, and the courts in the cases cited in support of the OTC's position, make policy arguments and seek to interpret the

language of the statute, the undersigned finds that this is simply not a case which requires statutory interpretation. The function of the court is to enforce the statute as written, not as it might have been written. *In re Blackwell*, 115 B.R. 86 (Bankr. W.D. Va. 1990). The words of the statute are plain and unambiguous. Congress only excepted debts from discharge when a required return was not filed. The Oklahoma statute gives the taxpayer the option of notifying the state by amended return or by letter. Since the duty to notify can be satisfied by either an amended return or letter, it cannot fairly be said that a return is "required."

IV. CONCLUSION

Based upon the above analysis, it is therefore recommended that the decision of the Bankruptcy Court be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison,* 175 F.3d 1217 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 1ST day of December, 1999.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each the parties hereto by mailing the same to em or to their attorneys of record on the 3rd Day of December, 1999.

C Patillo, a Deputy Clerk

Frank H. McCarthy

FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 0 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE PALMER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-372-M**
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	ENTERED ON DOCKET
	)	DATE DEC 03 1999
Defendant.	)	

O R D E R

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 2nd day of Dec. 1999.

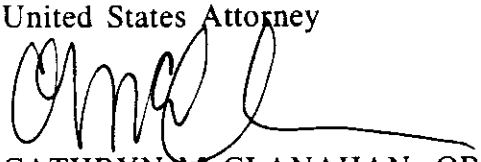
Frank H. McCarthy

FRANK H. McCARTHY
United States Magistrate Judge

9

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PIONEER INSURANCE COMPANY, AMWEST SURETY INSURANCE COMPANY, CONDOR INSURANCE COMPANY, OLD GUARD INSURANCE COMPANY, AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, AMERICAN PROGRESSIVE LIFE AND HEALTH INSURANCE COMPANY OF NEW YORK, AMERICAN PIONEER LIFE INSURANCE COMPANY OF NEW YORK, UNITED TEACHER ASSOCIATES INSURANCE COMPANY, FEDERATED RURAL ELECTRIC INSURANCE CORP., CENTRAL REASSURANCE CORP. & EQUITABLE LIFE, PHYSICIANS MUTUAL INSURANCE COMPANY, OZARK NATIONAL LIFE INSURANCE COMPANY, CENTRAL STATES HEALTH AND LIFE COMPANY OF OMAHA, MEDICO LIFE INSURANCE COMPANY, MUTUAL PROTECTIVE INSURANCE COMPANY, GUARANTEE TRUST LIFE INSURANCE COMPANY, and PHYSICIANS LIFE INSURANCE COMPANY,

Plaintiffs,

vs.

CHASE SECURITIES, INC., a Delaware corporation, FITCH IBCA, INC., a Delaware corporation, WILLIAM BARTMANN, an individual, DIMAT CORPORATION, an Oklahoma corporation, JAY L. JONES, an individual, KATHRYN A. BARTMANN, an individual, GERTRUDE BRADY, an individual, MIKE C. TEMPLE, an individual, CHARLES C. WELSH, an individual, ANDERSEN WORLDWIDE, successor to ARTHUR ANDERSEN, L.L.P., a partnership, and JOHN DOES 1 THROUGH 30, individuals or business organizations,

Defendants.

Case No. 99-CV-919-C (J)

ENTERED ON DOCKET

DATE DEC 03 1999

D/B C

PLAINTIFFS' DISMISSAL OF CERTAIN DEFENDANTS WITHOUT PREJUDICE

The Plaintiffs, pursuant to Fed. R. Civ. P. 41(a)(1)(i), hereby dismiss their claims in the above action against Defendants Andersen Worldwide successor to Arthur Andersen LLP and Fitch IBCA, Inc., without prejudice to the refiling thereof.

Respectfully submitted,

ATKINSON, HASKINS, NELLIS, BOUDREAUX, HOLEMAN, PHIPPS & BRITTINGHAM

K. Clark Phipps, OBA#11960
John J. Carwile, OBA #10757
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524
Telephone: (918) 582-8877
Facsimile: (918) 585-8096
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

This is to certify that on this, the 2nd day of December, 1999, a true, correct, and exact copy of the above and foregoing instrument was mailed to the following counsel of record, with proper postage thereon fully prepaid:

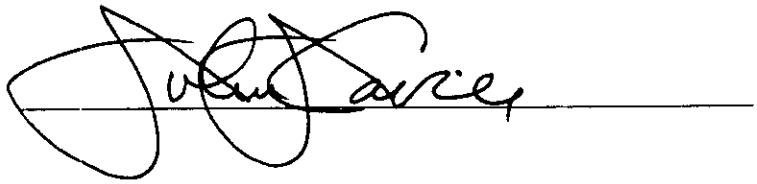
Terry W. Tippens
Attorney at Law
Bank One Tower
100 N. Broadway, Suite 1700
Oklahoma City, Oklahoma 73102-8820

R. Thomas Seymour
Attorney at Law
100 W. 5th Street, Suite 550
Tulsa, Oklahoma 74103-4288

P. David Newsome, Jr.
Attorney at Law
3700 First Place Tower
15 E. 5th Street
Tulsa, Oklahoma 74103-4344

James M. Reed
Attorney at Law
320 S. Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708

Tony M. Graham
Attorney at Law
525 S. Main, Suite 1000
Tulsa, Oklahoma 74103-4514



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FILED

DEC 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SHELLY PADGET,
SSN: 441-54-6077

Plaintiff,

vs.

KENNETH APFEL COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No: 99-CV-439-J

ENTERED ON DOCKET
DEC 3 1999
DATE

STIPULATION OF DISMISSAL

Plaintiff, Shelly Padget, sought judicial review of a January 22, 1998 decision of the Commissioner of the Social Security Administration denying Social Security disability and Supplemental Security Income benefits. Subsequent to this appeal Plaintiff received a decision from the Commissioner finding her disabled beginning February 1, 1996. Both parties stipulate that Plaintiff has been disabled under Title II and Title XVI of the Social Security Act since February 1, 1996 and is entitled to benefits based upon her October 31, 1996 application. Both parties request an order from the court dismissing this case.

AGREED AS TO FORM AND CONTENT:

Michael D. Clay, OBA #13624
7615 E. 63rd Pl, Ste. 200
Tulsa, OK 74133
(918) 254-1414

Attorney for the Plaintiff

Cathryn McClanahan, OBA #14853
333 W. Fourth St., Ste. 3460
Tulsa, OK 74103
(918) 581-7463

Assistant United States Attorney

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 2nd day of December, 1999 I hand-delivered a true and correct copy of the foregoing documents with proper postage thereon prepaid, addressed to:

Cathryn McClanahan
Asst. U.S. Attorney
333 W. Fourth Street, #3460
Tulsa, OK 74103

Angela Hancock
Managing Senior Paralegal

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDWARD L. GOODWIN, an individual, and EDWARD L. GOODWIN, next of kin of ALMETA GOODWIN, deceased,

Plaintiff,

vs.

FARMERS INSURANCE GROUP OF COMPANIES d/b/a FIRE INSURANCE EXCHANGE, FIRE UNDERWRITERS ASSOCIATION, FARMERS INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION, and FARMERS INSURANCE COMPANY, INC.,

Defendants.

No. CIV-99C 395-BU(J)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Edward L. Goodwin, an individual and Edward L. Goodwin, next of kin of Almeta Goodwin, deceased, and Defendants, Farmers Insurance Company, Inc. and Farmers Insurance Exchange, by and through their counsel of record, state that they have reached a settlement and compromise of this action and hereby stipulate to the dismissal with prejudice of all claims they have asserted against each other herein. All parties to bear their own costs and attorneys' fees.

DATED this 22nd day of November, 1999.

T. TODD HICKS, OBA #16130
ELLIOTT AND MORRIS
204 North Robinson, Suite 2200
Oklahoma City, Oklahoma 73102
(405) 236-3600/(405) 239-2265 (Facsimile)
ATTORNEYS FOR DEFENDANTS, FARMERS INSURANCE COMPANY, INC. AND FARMERS INSURANCE EXCHANGE

Warren G. Morris, OBA #6431
C. Eric Pfansteil, OBA #16712
1918 East 51st Street, Suite 1-E
Tulsa, Oklahoma 74105
(918) 749-1775
ATTORNEYS FOR PLAINTIFF

F:\DOC\2409\Stipulation of Dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD MARCANTEL, an individual, and DEBRA MARCANTEL, an individual,

Plaintiffs,

vs.

FORD MOTOR COMPANY, AUTOZONE, INC., CHAMPION LABORATORIES, INC., AND FUEL FILTER TECHNOLOGIES, INC.,

Defendants.

Case No. 98-CV-527-H (E)

STIPULATION FOR DISMISSAL OF DEFENDANT FORD MOTOR COMPANY WITH PREJUDICE

COME NOW plaintiffs and defendant Ford Motor Company ("Ford"), by and through counsel of record, and advise the Court that all plaintiffs' claims against Ford have been fully settled and compromised, and it is hereby agreed by the parties that plaintiffs' actions against Ford shall be dismissed, with prejudice, each party to bear their own costs.

SHOOK, HARDY & BACON L.L.P.

By _____
John F. Murphy
George E. Wolf
Ann M. MacPherson

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118
816/474-6550
FAX: 816/421-4066

and

Reuben Davis, OBA #2208
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
918/587-0000
FAX: 981/599-9317

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

GARRISON, BROWN, CARLSON, BUCHANAN
& BUSBY

By _____
Alan R. Carlson

P. O. Box 1217
Bartlesville, Oklahoma 74403

ATTORNEYS FOR PLAINTIFFS

A copy of the foregoing was
mailed, postage prepaid, this
15th day of December, 1999, to:

Dan S. Folluo, Esq.
Secrest, Hill & Folluo
7134 S. Yale, Suite 900
Tulsa, Oklahoma 74136

ATTORNEYS FOR AUTOZONE, INC.,
CHAMPION LABORATORIES, INC.,
and FUEL FILTER TECHNOLOGIES, INC.

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTA PIPE,

Plaintiff,

-vs-

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

ENTERED ON DOCKET

DATE DEC 3 1999

Case No. 99-CV-0383-K(E)

FILED

DEC 02 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the parties' Joint Stipulation of Dismissal with Prejudice. Upon due consideration, it is hereby

ORDERED, ADJUDGED, AND DECREED that the above entitled action is hereby dismissed with prejudice to refiling.

Dated this 1 day of December, 1999.

TERRY KERN,
Chief United States District Judge
for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA ANNETTE DRUMMOND (formerly CAMPBELL),

Plaintiff,

vs.

JIM HOUK SEAMLESS GUTTERING AND SUPPLY, INC., an Oklahoma corporation,

Defendant.

Case No. 99-CV-0627BU(E)

ORDER OF DISMISSAL WITH PREJUDICE

The Plaintiffs and Defendant Jim Houk Seamless Guttering and Supply, Inc., having compromised and settled all issues in the action and having stipulated that the Complaint and the action may be dismissed with prejudice, it is therefore,

ORDERED, that the Complaint and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 2nd day of Dec, 1999.

Michael Burrage
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 2 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.) CIVIL NO. 99CV464BU
)
MIKEAL BLEVINS,)
)
Defendant.)

ENTERED ON DOCKET
DATE DEC 03 1999

O R D E R

Upon the motion of the United States and for good cause shown it is hereby ORDERED that the United States' Motion to Reinstate its Judgment be granted.

Michael Burrage
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

Stephen C. Lewis
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA# 7169
Assistant United States Attorney
333 West Fourth Street, Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 2 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MODULAR STORAGE SYSTEMS, INC., and GREAT HOUSE,

Plaintiffs,

vs.

THE SHERWIN WILLIAMS COMPANY, an Ohio corporation,

Defendant.

Case No. 98-CV-774-BU

ENTERED ON DOCKET
DATE DEC 03 1999

ORDER OF DISMISSAL

Pursuant to the Stipulation of the parties, this Court orders this action be dismissed with prejudice.

IT IS ORDERED this 2nd day of ~~November~~ Dec, 1999.

Michael Burrage
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLAY SADLER,

Plaintiff,

vs.

THOMAS C. LANE, WILLIAM E. ERICKSON, O.G. THOMPSON, DANNY MELTON,

Defendants.

Case No. 98-C-892-E

ORDER

Now before the Court is the Motion for Attorneys' Fees (Docket # 17) of the Defendants Thomas C. Lane, William E. Erickson, O. G. Thompson and Danny Melton.

Sadler was the elected Mayor of the City of Beggs. He claimed that Lane, City Attorney for the City of Beggs, and Melton and Thompson, City Councilmen of the City of Beggs, conspired to have Erickson, Municipal Judge for the City of Beggs, issue an Ex-Parte Order restraining him from carrying our his duties as Mayor of the City of Beggs. He asserted that the actions of defendants violated his right to equal protection, and amounted to an abuse of process and malicious prosecution.

Defendants sought dismissal or summary judgment, claiming that they were immune from suit, that plaintiff had failed to state a claim for violation of civil rights, that plaintiff had failed to meet the heightened pleading standard for civil rights claims against individuals, that plaintiff's claims were barred by the applicable statutes of limitations, that plaintiffs claims were barred by the release, and that venue was improper in this Court. In addition, Erickson argued that dismissal was proper because he had not been served with summons; Lane, Thompson, and Melton asserted that

22

plaintiff's claims were barred by the Eleventh Amendment; and Thompson and Melton asserted that the Court lacked jurisdiction over the state law claims.

Sadler failed to respond to any of the three motions. The Court declined to deem the motions confessed, but found that, as a matter of law, all of plaintiff's claims were barred by the state of limitations, and entered an order of dismissal. Defendants now seek an award of attorney's fees pursuant to 42 U.S.C. §1988. Defendants seek $7867.50 in attorney's fees, which represents 76.8 hours billed at $100 per hour and 1.5 hours billed at $125 per hour.

Defendants concede that the cases law "applies a rather strict standard" for an award of attorney's fees in civil rights cases. 42 U.S.C. §1988 provides in pertinent part: "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ." Before such an award can be made, however, the Court must find that plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Defendants argue that Plaintiff's counsel's failure to conduct a cursory investigation pursuant to his duties under Rule 11, Fed.R.Civ.P., his failure to dismiss his lawsuit as soon as the first motion was filed, and the overwhelming amount of authority in favor of dismissal of the claims all support a finding that the action was frivolous, unreasonable, or without foundation. Although plaintiff attempts to distinguish the authority relied on by defendant, he does not address his failure to consider the statute of limitations as an issue, or his failure to dismiss upon receipt of the first motion. It is these facts that cause the Court to find that an award of attorney fees is appropriate in this case.

The starting point for determination of the fee is the lodestar, which is the product of the

hours reasonably expended on the litigation and an hourly rate that is consistent with hourly rates in the community for lawyers of comparable experience handling similar types of litigation. Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983). From the affidavit of Defendants' counsel, Marthanda Beckworth, it is apparent that 76.8 hours was spent researching and preparing three different motions to dismiss: one for Tome C. Lane Sr., the City Attorney, one for William E. Erickson, the Municipal Judge, and one for O.G. Thompson and Danny Melton, City Councilmen. The Court initially finds that individual research and work done on three motions that were substantially similar is unreasonable. Therefore, the Court finds it appropriate to reduce the hours requested by two thirds, to 25.6. The Court is further concerned with the reasonableness of having spent a significant number of hours on research and preparation of a number of issues when one, the statute of limitations, was a "dead bang winner". Accordingly, the hours requested is further reduced by half, for a reasonable number of hours of 12.8.

The hourly rate sought by defendants counsel is $100 for Ms. Beckworth, and $125 for the attorney who opened the file and made the initial contact with the clients. The Court finds, based on the submitted affidavits that these rates are reasonable rates and consistent with rates in the community for similar work.

Defendants' Motion for Attorney's Fees (Docket # 17) is Granted in the amount of $1467.50.

IT IS SO ORDERED THIS 30th DAY OF NOVEMBER, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES GATEWOOD, et al,

Plaintiff(s),

vs.

INDEPENDENT SCHOOL DIST. #1, OTTAWA COUNTY, OKLAHOMA,

Defendant(s).

Case No. 99-C-258-B

ORDER DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 1st day of December, 1999.

THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PATRICIA D. WILSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-392-EA**
	)	
KENNETH S. APFEL, Commissioner, Social Security Administration,	)	
	)	
Defendant.	)	

ORDER

On August 18, 1999, this Court reversed the decision of the Commissioner and remanded this case to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of $3,661.25 for attorney fees and $8.54 for costs, for a total award of $3,669.79 for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of $3,661.25 and costs of $8.54 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act,

plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 1st day of December 1999.

Claire V. Eagan

CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Wyn Lee Baker for

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARTA PIPE,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 99-CV-0383-K(E)
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the parties, Plaintiff Marta Pipe and Defendant State Farm Fire and Casualty Company, and pursuant to FED. R. CIV. P. 41(a)(1)(ii) hereby stipulate to dismiss the above-entitled action, and any and all causes of action arising therefrom or which could have been asserted therein, **with prejudice** to refiling, with each party to bear their own costs and attorney fees.

Respectfully submitted,

By: _____
JOSEPH F. CLARK, OBA #1706
Attorney at Law
1605 South Denver
Tulsa, OK 74119

Attorney for Plaintiff Marta Pipe

-and-

STAUFFER, RAINEY, GUDGEL & HATHCOAT, P.C.

By: _____
NEAL E. STAUFFER, OBA #13168
KENT B. RAINEY, OBA #14619
1100 Petroleum Club Building
601 South Boulder
Tulsa, OK 74119
(918) 592-7070

Attorneys for Defendant State Farm Fire and Casualty Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CATHY CLIFT, d/b/a CORPORATE HELICOPTERS,	)	
Plaintiff,	)	**Case No.: 99 CV-0315 K (E)**
v.	)	
RELIANCE NATIONAL INSURANCE COMPANY, a Delaware corporation	)	
Defendant.	)	

DEFENDANT RELIANCE NATIONAL INSURANCE COMPANY'S DISMISSAL WITHOUT PREJUDICE

COMES NOW the Defendant, Reliance National Insurance Company, and hereby dismisses the above referenced matter without prejudice against the filing of future actions, in conjunction with the dismissal filed by the Plaintiff on October 7, 1999,

This 30th day of November, 1999.

Respectfully submitted,

Morrel, West, Saffa, Craige & Hicks, Inc.

By: _____

Mark A. Craige, OBAA #1992
City Plaza West, 11th Floor
5310 East 31st Street
Tulsa, Oklahoma 74135
(918) 664-0800 Telephone
(918) 663-1383 Facsimile
E-mail: mark@law-office.com

and

Thomas J. Strueber
Georgia Bar No. 689220
Andrea B. Jones
Georgia Bar No. 090515
Lord, Bissell & Brook
One Atlantic Center, Suite 3700
1201 West Peachtree Street, NW
Atlanta, Georgia 30309
(404) 870-4600 Telephone
(404) 872-5547 Facsimile
Counsel for Defendant
Reliance National Insurance Company

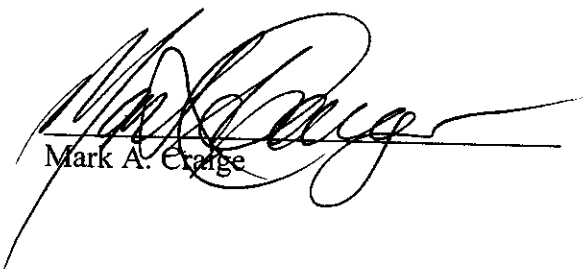
CERTIFICATE OF SERVICE

This is to certify that I have this date served the foregoing **DEFENDANT RELIANCE NATIONAL INSURANCE COMPANY'S DISMISSAL WITHOUT PREJUDICE** on counsel of record in this matter by placing a true and correct copy of same in the United States mail, postage prepaid, addressed as follows:

Marcus S. Wright
4815 South Harvard
Suite 447
Tulsa, Oklahoma 74135

Robert G. McCampbell
Randall J. Snapp
Crowe & Dunlevy
1800 Mid-America Tower
20 N. Broadway
Oklahoma City, OK 73102

This 30th day of November, 1999.



Mark A. Craige

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA R. TERRY,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF OTTAWA COUNTY and BEVERLY STEPP, in her official capacity as Court Clerk of Ottawa County,

Defendants.

Case No. 99-CV-125-E

ORDER

Now before the Court is the Motion for an Award of Attorney's Fees (Docket # 8) of the Plaintiff Debra R. Terry.

Plaintiff claims that defendants violated the Americans with Disabilities Act (ADA), the Oklahoma Anti-Discrimination Act, and the Rehabilitation Act by terminating her from her position as the Ottawa County Sheriff's Department Dispatcher while she was hospitalized as a result of her bi-polar disorder. Defendants failed to Answer plaintiff's Complaint, and a default judgment was granted on August 3, 1999. Subsequent to a hearing on damages, the Court specifically found that a factual basis existed for plaintiff's claims under the ADA, the Rehabilitations Act, and the Oklahoma Anti-Discrimination Act, and awarded plaintiff $28,711 in damages. Plaintiff now seeks attorney's fees pursuant to the fee shifting provisions of the ADA, the Rehabilitations Act, and the Oklahoma Anti-Discrimination Act. Plaintiff seeks $4,699 in attorney's fees, which is the product of 25.40 hours times $185.00 per hour.

As an initial matter, the Court finds that plaintiff, as the prevailing party, is entitled to a

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reasonable attorney fee. 42 U.S.C. §12205 provides that in an action based on the ADA, the court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs. . . . " The Court specifically finds that plaintiff is the prevailing party, and that an award of attorney's fees is appropriate under the facts of this case.

The starting point, then for determination of the fee is the lodestar, which is the product of the hours reasonable expended on the litigation and an hourly rate that is consistent with hourly rates in the community for lawyers of comparable experience handling similar types of litigation. Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983). Plaintiff requests to be compensated for 25.40 hours. The court specifically notes that, although co-counsel was present at the hearing on damages, the total hours submitted reflect the time of only one attorney. The hours billed reflect a substantial effort at pre-filing settlement, research on applicable legal theories and preparation for the hearing on damages. Moreover, the Court has carefully reviewed the hours submitted, and finds, in light of the affidavits of Steven Novick and J. Daniel Morgan, that the time expended was reasonable and necessary in the litigation of this case. Similarly, the Court finds, based on the affidavit of J. Daniel Morgan, and the fact that plaintiff's counsel has previously been awarded a fee in this district based on an hourly rate of $185, that the $185 requested is consistent with hourly rates in the community for lawyers of comparable experience in handling employment and civil rights litigation. Lastly, the Court finds that the relief awarded was substantially similar to the relief requested, that plaintiff prevailed on each of her theories, and that plaintiff's case was a relatively straightforward one. Therefore, the Court finds no reason to either decrease or increase the lodestar amount.

Plaintiff's Motion for Attorney's Fees (Docket # 8) in the amount of $4,699 is granted.

IT IS SO ORDERED THIS 29th DAY OF OCTOBER, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD EATON,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 97-CV-340-J

ORDER REMANDING CASE TO COMMISSIONER

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, the above-referenced matter is **REMANDED** to the Commissioner for further proceedings consistent with the Court of Appeals' Order and Judgment entered on October 4, 1999.

Dated this 30th day of November 1999.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIP R. EVANS,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security
Administration,

Defendant.

Case No. 98-CV-681-J

ENTERED ON DOCKET

DEC 1 1999

ORDER

On August 19, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. **No appeal was taken from this Judgment and the same is now final.**

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on November 17, 1999, the parties have stipulated that an award in the amount of $2,746.25 for attorney fees and $8.54 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of $2,746.25 and costs of $8.54 for a total award of $2,754.79 under the Equal Access To Justice Act.

SAM A. JOYNER
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RALPH FISHER,

Plaintiff,

vs.

GORDON'S JEWELERS,
a Corporation,

Defendant.

No. 99-CV-988-H (J)

ORDER

Plaintiff, a prisoner confined at the Oklahoma State Reformatory in Granite, Oklahoma, seeks to bring this civil action *in forma pauperis* against Defendant Gordon's Jewelers. Based on representations in the motion for leave to proceed *in forma pauperis*, the Court finds Plaintiff lacks sufficient funds to prepay the full $150.00 filing fee. Therefore, he should be granted leave to proceed *in forma pauperis*. However, under 28 U.S.C. § 1915(e)(2), as amended by the Prison Litigation Reform Act of 1996 ("PLRA"), the Court is directed to dismiss a suit brought *in forma pauperis* at any time if the Court determines that it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. For the reasons discussed below, the Court finds that this case should be dismissed.

ANALYSIS

A. Failure to allege prima facie elements of a civil rights claim

In his complaint, Plaintiff alleges that Defendant (1) violated his "Constitutional and Civil right" to be free of false arrest/false imprisonment; (2) knowingly, willfully, and intentionally filed

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a false complaint and gave false and misleading testimony to defraud Plaintiff of his liberty; (3) conspired with others to file a false criminal complaint, gave false and misleading testimony and withheld exculpatory evidence to defraud Plaintiff of his liberty; and (4) acted maliciously, intentionally and with a total disregard of the known rights of Plaintiff to cause severe emotional and physical abuse, loss of liberty, loss of earnings. Plaintiff seeks compensatory and punitive damages. Plaintiff states that the events giving rise to his complaint occurred during the time period May to September, 1987. See Docket #1.

To the extent Plaintiff alleges a violation of his civil rights, this Court's federal question jurisdiction arises pursuant to 42 U.S.C. § 1983, which provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States,[1] and that defendant acted under color of law.[2] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice

[1]The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[2]There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

of the grounds on which it rests. Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If a plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). While pro se complaints are held to less stringent standards and must be liberally construed, nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Haines v. Kerner, 404 U.S. 519, 520 (1972); Hall, 935 F.2d at 1110.

In the instant case, Plaintiff has completely failed to allege any conduct whereby Defendant Gordon's Jewelers acted under color of state law. Construing Plaintiff's *Complaint* liberally in accord with his *pro se* status, the Court concludes that Plaintiff has failed to establish an essential element of a civil rights action pursuant to section 1983: that defendant deprived him of a right secured by the Constitution and laws of the United States while acting under color of state law. Therefore, Plaintiff has failed to state a claim upon which relief can be granted, and accordingly, to the extent this Court's jurisdiction is premised on a federal question arising under 42 U.S.C. § 1983, his *Complaint* should be dismissed.

Absent a cause of action under 42 U.S.C. § 1983, this Court lacks jurisdiction to consider Plaintiff's tort claims against Defendant.[3] Should Plaintiff's claims survive the bar imposed by the statute of limitations, Plaintiff may seek relief on his tort claims in the state courts of Oklahoma.

B. Payment of filing fee

Although Plaintiff has been granted leave to proceed *in forma pauperis*, the PLRA requires the district court to assess and collect the $150 filing fee even when a case is dismissed before service of the summons and complaint. See 28 U.S.C. § 1915(b)(1). Therefore, based on the Statement of Institutional Accounts and the prison accounting provided by Plaintiff in support of his motion, Plaintiff shall pay an initial partial filing fee of **$13.03,** which represents 20 percent of the greater of the (1) average monthly deposits, or (2) average monthly balance in Plaintiff's prison account(s) for the six-month period immediately preceding the filing of the complaint. 28 U.S.C. §1915(b). After payment of the initial partial filing fee, Plaintiff shall make monthly payments of 20 percent of the preceding month's income credited to his prison account(s) until he has paid the total filing fee of $150. 28 U.S.C. § 1915(b)(2). The trust fund officer at Plaintiff's current place of incarceration is hereby ordered to collect, when funds exist, monthly payments from Plaintiff's prison account(s) in the amount of 20% of the preceding month's income credited to the account. Monthly payments collected from Plaintiff's prison account(s) shall be forwarded to the clerk of court each time the account balance exceeds $10 until the full $150 filing fee is paid. Separate

[3]Plaintiff has failed to meet his burden of alleging information sufficient to satisfy diversity jurisdiction requirements imposed by 28 U.S.C. § 1332. The requisite amount in controversy and the existence of diversity must be affirmatively established in the pleading of the party seeking to invoke jurisdiction. See Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), *cert. denied*, 116 S.Ct. 174 (1995).

deductions and payments shall be made with respect to each action or appeal filed by Plaintiff. All payments shall be sent to the Clerk, 411 United States Courthouse, 333 West Fourth Street, Tulsa, Oklahoma 74103-3819, attn: PL Payments, and shall clearly identify Plaintiff's name and the case number assigned to this action. The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Reformatory, P.O. Box 514, Granite, OK 73547-0514.

This dismissal counts as one of Plaintiff's three allotted dismissals under 28 U.S.C. § 1915(g).[4]

CONCLUSION

After liberally construing Plaintiff's allegations, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege that Defendant Gordon's Jewelers acted under color of state law in depriving him of a right secured by the Constitution of the United States. Therefore, Plaintiff's *Complaint* fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983. Finding no other basis for jurisdiction, the Court finds the *Complaint* should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). Plaintiff must nonetheless pay the $150 filing fee in full as set forth in this Order.

[4]28 U.S.C. § 1915(g) provides that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed *in forma pauperis* (#2) is **granted.** Nonetheless, Plaintiff is responsible for payment of the $150.00 filing fee. Plaintiff shall make an initial partial payment of **$13.03** and, thereafter, monthly payments of 20% of the preceding month's income credited to his account(s). Prison officials having custody of Plaintiff shall forward payments from Plaintiff's account(s) to the Clerk at the above-cited address each time the amount in the account(s) exceeds $10 until the filing fee is paid.

2. This action is **dismissed with prejudice** pursuant to 28 U.S.C. 1915(e)(2)(B).

3. The Clerk of the Court is directed to "**flag**" this dismissal as a "prior occasion" for purposes of §1915(g).

4. The Clerk shall send a copy of this Order to the trust fund officer at the Oklahoma State Reformatory, P.O. Box 514, Granite, OK 73547-0514.

IT IS SO ORDERED.

This 24TH day of NOVEMBER, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

PEGGY HARDER,

Plaintiff,

vs.

AMERICA'S RENT-TO-OWN CENTER, INC., d/b/a AMERICA'S SALES & LEASING,

Defendants.

ENTERED ON DOCKET
DATE DEC 01 1999

Case No. 99-CV-0159K

FILED
IN OPEN COURT
NOV 30 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 30 day of November, 1998, the above-styled and numbered cause coming on for hearing before the undersigned Judge of the United States District Court in and for the Northern District of Oklahoma, upon the Stipulation for Dismissal of Plaintiff and Defendant herein; and the Court, having examined the pleadings and being well and fully advised in the premises, is of the opinion that said cause should be dismissed with prejudice to its refiling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled and numbered cause be and the same is hereby dismissed with prejudice to its refiling. Each party is to bear their own costs and attorney fees in this matter.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE DEC 0 1 1999

JAMES J. DERMODY,

Plaintiff,

v.

AQUARIUS ENTERPRISES, INC., an Oklahoma corporation,

Defendant.

Case No. 99-CV-210-K

FILED

NOV 30 1999

Phil Lombardi
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER APPROVING SETTLEMENT, DISMISSING CASE WITH PREJUDICE AND FOR DISBURSEMENT OF SETTLEMENT PROCEEDS

NOW on this 30 day of November, 1999, comes on before me, the undersigned United States District Judge, the Joint Application for Order Approving Settlement, Dismissing Case and Disbursing Settlement Proceeds filed herein. The Court, after reviewing same, as well as the separately submitted Settlement Agreement, finds that the settlement proffered herein is in the best interest of all parties and that the Joint Application should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the proposed Settlement Agreement between the two parties is in the best interest of all concerned and that same is hereby approved by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the proceeds of the settlement be paid to Julie Dermody and Steven R. Hickman, her attorney.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be, and same is hereby, dismissed with prejudice, each party to bear his, her or its own costs.

TERRY C. KERN,
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:

Steven R. Hickman,
Attorney for Plaintiff

Ronald E. Goins,
Attorney for Defendant